IN THE

Supreme Court of the United States

FALL TERM, 1978

No. 78-354

STATE OF NORTH CAROLINA

Petitioner,

v.

WILLIE THOMAS BUTLER,
A/K/A "TOP CAT"

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

RUFUS L. EDMISTEN
Attorney General of
North Carolina

LESTER V. CHALMERS, JR.
Special Deputy Attorney
General

DONALD W. STEPHENS
Assistant Attorney General

North Carolina Department
of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-2011

Counsel for Petitioner

DI CESARE - Printing — 331-6181 — Washington, D.C. 20004

CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Question Presented 2

Constitutional Provisions Involved 2

Statement of the Case:

A. General Background 3

B. Facts Material to the Question Presented 3

C. Manner in Which the Federal Question Was Raised 5

Reasons for Granting the Writ 9

Conclusion 18

Appendix A: Opinion of North Carolina Supreme Court A-1

Certificate of Service

TABLE OF AUTHORITIES

Constitutional Provisions

United States Constitution, Amendment V 2

United States Constitution, Amendment XIV, Section 1 2

Statutes

28 United States Code, § 1257(3) 2

N.C. Gen. Stat. § 14-39 3

N.C. Gen. Stat. § 14-87 3

N.C. Gen. Stat. § 14-32(a) 3

Cases Cited

Federal

Blackmon v. *Blackledge*, 541 F.2d 1070 (4th Cir. 1976) 12, 16

Blackmon v. *Blackledge*, 396 F. Supp. 296 (W.D.N.C.) 1975) 13

Bond v. *United States*, 397 F.2d 162 (10th Cir.) Cert Denied 393 U.S. 1035 (1969) 14, 15

Brewer v. *Williams*, 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977) 11, 16

Carnley v. *Cochran*, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962) 14

Hughes v. *Swenson*, 452 F. 2d 886 (8th Cir. 1971) 15

Miranda v. *Arizona*, 384 U.S. 436 (1966) 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 16

Mitchell v. *United States*, 434 F. 2d 483 (D.C. Cir.), cert. denied 400 U.S. 867 (1970) 15

State of Oregon v. *Hass*, 420 U.S. 714, 43 L. Ed 2d 570, 95 S. Ct. 1215 (1975) 11, 19

United States v. *Boston*, 508 F. 2d 1171 (2nd Cir. 1974) 15, 16

United States v. *Cavallino*, 498 F. 2d 1200 (5th Cir. 1972) 15

United States v. *Cooper*, 499 F. 2d 1060 (D.C. Cir. 1974) 15

United States v. *Ganter*, 436 F. 2d 364 (7th Cir. 1970)... 15

United States v. *Hilliken*, 436 F. 2d 101 (9th Cir. 1970)... 15

United States v. *James*, 528 F. 2d 999 (5th Cir. 1976) ... 16

United States v. *Marchildon*, 519 F. 2d 337 (8th Cir. 1975) 15, 16

United States v. *McNeil*, 433 F. 2d 1109 (D.C. Cir. 1974) 15

United States v. *Montos*, 421 F. 2d 215 (5th Cir.) cert. denied, 397 U.S. 1022 (1970) 14, 15

United States v. *Moreno-Lopez*, 466 F. 2d 1205 (9th Cir. 1972) 15

United States v. *Ruth*, 394 F. 2d 134 (3rd Cir.) cert. denied, 393 U.S. 888 (1968) 15

United States v. *Speaks*, 453 F. 2d 966 (1st Cir. 1971)... 15

United States v. *Stuckey*, 441 F. 2d 1104 (3rd Cir.) cert. denied, 404 U.S. 841 (1971) 15

State

Aaron v. *State*, Del. Supr. 275 A. 2d 791 (1971) 17

Bowling v. *State*, Tenn. Cr. App. 458 S.W. 2d 639 (1970) 18

Burton v. *State*, 7 Md. App. 671, 256 A. 2d 826 (1969)... 17

Commonwealth v. *Cost*, 238 Pa. Superior Ct. 591, 362 A. 2d 1027 (1976) 18

Commonwealth v. *Garnett*, 458 Pa. 4, 326 A. 2d 335 (1974) 18

Commonwealth v. *Johnson*, Mass. App. 326 N.E. 2d 355 (1975) 17

Commonwealth v. *Murray*, 359 Mass. 541, 269 N.E. 2d 641 (1971) 17

Land v. *Commonwealth*, 211 Va. 223, 176 S.E. 2d 586 (1970) (reversed on other grounds) 18

Miller v. *State*, 251 Md. 362, 247 A. 2d 530 (1968) ... 17

Parks v. *State*, Tenn. Cr. App. 543 S.W. 2d 855 (1976)... 18

Peek v. *State*, 239 Ga. 422, 238 S.E. 2d 12 (1977) .. 16, 17

People v. *Brooks*, 51 Ill. 2d 156, 281 N.E. 2d 326 (1972)... 17

People v. *Johnson*, 75 Cal. Rptr. 401, 450 P. 2d 865 (reversed on other grounds) (1969) 17

People v. *Sam*, 77 Cal. Rptr. 804, 454 P. 2d 700 (1969)... 17

People v. *Weaver*, 179 Colo, 331, 500 P. 2d 980 (1972)... 17

Reed v. *People*, 171 Colo, 421, 467 P. 2d 809 (1970) ... 17

Shirley v. *State*, Okl. Cr. 520 P. 2d 701 (1974) 18

State v. *Alewine*, Mo. 474 S.W. 2d 848 (1972) 17

State v. *Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971). 5, 13

State v. *Blackmon*, 284 N.C. 1, 199 S.E. 2d 431 (1973)... 13

State v. *Burnside*, Mo. 473 S.W. 2d 697 (1971) 17

State v. *Craig*, Fla. 237 So. 2d 737 (1970) 17

State v. *Davidson*, 252 Ore. 617, 451 P. 2d 481 (1969)... 18

State v. *Hazelton*, Me. 330 A. 2d 919 (1975) 17

State v. *Nelson*, ____ Minn. ____, 257 N.W. 2d 356 (1977) 17

State v. *Pineda*, 110 Ariz. 342, 519 P. 2d 41 (1974) ... 16

State v. *Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977) 5

State v. *Williams*, Mo. Cr. App. 547 S.W. 2d 139 (1977) 17

State v. *Young*, 89 Wash. 2d 613, 574 P. 2d 1171 (1978) ... 18

State ex rel Berger v. *Superior Court*, 109 Ariz. 506, 513 P. 2d 935 (1973) 16

Sullivan v. *State*, Ala. Cr. App. 351 So. 2d 659, cert. denied 351 So. 2d 665 (1977) 16

IN THE

Supreme Court of the United States

FALL TERM, 1978

No. _____

STATE OF NORTH CAROLINA

Petitioner,

v.

WILLIE THOMAS BUTLER,
A/K/A "TOP CAT"

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

The Petitioner, State of North Carolina, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of North Carolina entered in this proceeding on June 6, 1978.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court granting *Butler* a new trial, Appendix A hereto, is reported at 295 N.C. 250, *244* S.E. 2d *410* (1978).

JURISDICTION

The decision of the Supreme Court of the State of North Carolina, Appendix A hereto, was filed on June 6, 1978, and this petition for a writ of certiorari was filed within 90 days of that date, pursuant to Rule 22(1). This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Interpreting this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), after being fully advised of his rights and acknowledging an understanding of such rights, in the absence of a specific affirmative oral or written waiver of counsel by a suspect under arrest and being questioned, does federal law prohibit a state trial court from finding an *implied* waiver of counsel from the surrounding facts and circumstances of the case, under the Fifth Amendment, as applicable to the State through the Fourteenth Amendment, thereby prohibiting the use by the prosecution as evidence in a state court an incriminating statement by the criminal defendant made to an agent of the FBI when arrested in another state on a fugitive warrant after the defendant had been fully advised of his constitutional rights as required by *Miranda* and then had replied to such advising FBI Agent that he understood his rights, that he "didn't want to sign anything" and that he would "talk to you but I am not signing any form", when defendant thereafter spoke freely and voluntarily in answering the agent's questions without ever requesting the presence of counsel?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V which provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Amendment XIV, Section 1:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. GENERAL BACKGROUND

Willie Thomas Butler was convicted upon trial by jury in Wayne County Superior Court, North Carolina for the offenses of Kidnapping [N.C. Gen. Stat. §14-39], Armed Robbery [N.C. Gen. Stat. §14-87], and Felonious Assault [N.C. Gen. Stat. §14-32(a)]. From a judgment imposing two concurrent life sentences and a five year sentence of imprisonment which also ran concurrently, the defendant appealed to the North Carolina Supreme Court. That Court reversed such convictions and ordered a new trial finding defendant's confession, which was admitted into evidence against him, did not comply with the North Carolina Supreme Court's interpretation of *Miranda* v. *Arizona, supra.*

B. FACTS MATERIAL TO THE QUESTION PRESENTED

The State's evidence tended to show that Ralph Burlingame was closing a Kayo service station about 11:00 p.m. on 28 December 1976 in Wayne County, North Carolina, when two black males came to the door to buy beer. The two left upon being informed that the station had closed. Burlingame thereafter locked up and started to his car, but was accosted by the same two

males with pistols drawn. He was forced into his vehicle and ordered to drive away at gunpoint. He was informed that "it was a holdup" and that he would be killed at the end of the ride because he was white. Upon hearing this, Burlingame opened the door and jumped from the moving vehicle. As he fled, he was shot in the back, the bullet penetrating his spinal cord and leaving his legs paralyzed. He "played dead" when the assailants stopped the car and returned to take $30.00 from his wallet and to shoot him twice more. The police found Burlingame lying in the road shortly afterwards. Two bullets, each of a different caliber, were removed from his body at the hospital. He survived, but remained paralyzed. He identified defendant's photograph along with that of the accomplice in a twelve-photograph display a short time later. In court he was positive that the defendant was the man who shot him (R. pp. 48-69).

After these offenses, defendant fled the state and on May 2, 1977 he was arrested in New York as a fugitive by FBI Agent David C. Martinez. Defendant was given the *Miranda* warnings by Agent Martinez at the time of his arrest and again back at the Agent's office, where Butler was asked to execute an "Advice of Rights Form". After reading the form he acknowledged that he understood what it said but he indicated that he didn't want to sign the form and he didn't want to sign anything. In response to the Agent's subsequent question of whether or not he would be willing to talk to them, defendant stated: "I will talk to you but I am not signing any form." Defendant thereafter made no express statement that he did not want a lawyer present, but he never requested a lawyer either (R.pp. 6-19). His subsequent incriminating statement to the FBI Agents was held admissible by the trial judge who found that such statement was freely and voluntarily made after a proper *Miranda* warning and the defendant had "effectively waived his rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions," since he had

read the rights form together with the waiver of rights, acknowledged his understanding of it, and chose to speak thereafter. This was assigned as error and it was this assigned error for which the North Carolina Supreme Court reversed defendant's convictions, ordering a new trial. The North Carolina Supreme Court interprets *Miranda* v. *Arizona, supra,* as requiring either an express written or an express oral waiver of counsel. Citing its own prior opinions, *State* v. *Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971) and *State* v. *Siler,* 292 N.C. 543, 234 S.E. 2d 733 (1977) the Court held that a correct interpretation of *Miranda* requires that "waiver of the right to counsel during interrogation will not be recognized unless such waiver is 'specifically made' after the *Miranda* warnings have been given." Thus, inclusion of defendant's incriminating statement in which he admitted drinking with a black male named Elmer Lee on 28 December 1976, agreeing with Lee to rob the Kayo gas station, accompanying Lee, who was armed, to the station, and participating in the robbery at the time Burlingame was shot, was prejudicial error requiring a new trial the Court held. (See Appendix A attached hereto.)

C. MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED

The federal question presented herein was originally raised by *Butler,* by his timely objection at trial to the admission of any statement which he made to FBI Agent Martinez at the time of his arrest and his interrogation. Upon such timely objection, the trial court heard evidence on voir dire out of the presence of the jury and thereafter made the following findings of fact and conclusions of law:

> ". . . the Court makes the following findings of fact:

That on or about May 3, 1977 Agent Martinez together with other agents went to a fifth floor apartment building in the Bronx, New York, and knocked on a door and gained entrance to the apartment; that the defendant, Butler, was present in the apartment and was placed under arrest at that time for unlawful flight to avoid prosecution, the agent having information at that time that the defendant had allegedly committed an offense of armed robbery in the State of North Carolina; that the defendant was advised of his rights orally at the time of the initial arrest in New York City, and was advised that he had the right to remain silent; that anything he said could be used against him in court, and that he had the right to talk to a lawyer for advice before any questions were asked but if he could not afford an attorney that one would be appointed for him before any questioning; that if he decided to answer questions without a lawyer present that he could stop at any time and would have the right to have an attorney appointed for him at that time.

Having been warned of his rights as required by the *Miranda* decision, the defendant made no statements nor was he asked any questions at the time of the initial arrest of the defendant; that the defendant was subsequently transported by Agent Martinez to the New Rochelle, New York office of the FBI where the defendant was taken to an interrogation room where he was presented with State's Exhibit 1 on Voir Dire, the paper writing entitled 'Your Rights'; that it had been previously determined by Agent Martinez that the defendant had an eleventh grade education and that he could read and write; that State's Exhibit Number 1 on Voir Dire indicates the rights as shown thereon as follows:

> 'Before we ask you any questions you must understand your rights. You have the right to remain silent; anything you say can be used against you in Court; you have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during the questioning; if you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.'

The form also provides in the middle thereof the designation 'Waiver of Rights'. The Waiver reads:

> 'I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.'

Having presented this form entitled 'Advice of Rights', and subdivision 'Your Rights' and 'Waiver of Rights', the defendant proceeded to read the form and upon conclusion of his reading the form indicated that he did not desire to sign the form but that he would make a statement to the agent which he proceeded to do as appears of record.

Based upon the foregoing, the court is of the opinion and concludes that the statement made by the

defendant, William Thomas Butler, to Agent David C. Martinez, was made freely and voluntarily to said agent after having been advised of his rights as required by the *Miranda* ruling, including his right to an attorney being present at the time of the inquiry and that the defendant, Butler, understood his rights; that he effectively waived his rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions, having read the rights form together with the Waiver of Rights; that the statement made by William Thomas Butler following the agent's advising him of his rights was voluntarily made at a time when the defendant understood his rights and that no promises or offers of leniency nor threats or pressure or coercion of any type has been exerted against the defendant, and that any statement or confession so made was freely and voluntarily given;

Based upon the foregoing, the court is of the opinion and rules as a matter of law that any statement made by William Thomas Butler in the presence of Agent David C. Martinez, after having been advised of his rights may be received in evidence in the trial of this action.

EXCEPTION No. 1"

(R.pp. 19-22)

The defendant's exception to such ruling was appealed from his conviction to the North Carolina Supreme Court asserting as error the admission of his confession in violation of his Federal constitutional rights. The North Carolina Supreme Court found the admission of such confession error and reversed, holding that

federal law (*Miranda* v. *Arizona*) requires the prosecution to show that an express oral or written waiver of right to counsel was specifically made by a defendant before his incriminating statement can be used as evidence against him and that no waiver can be implied in the absence of such express specific waiver.

The Federal Question presented herein has thus been properly raised and appropriately preserved at all stages of this case.

REASONS FOR GRANTING THE WRIT

A. The Supreme Court of North Carolina has decided an important question of Federal Constitutional law in a manner in conflict with the applicable decisions of this Court.

In establishing "concrete constitutional guidelines for law enforcement agencies and courts to follow," this Court's *Miranda* decision dictated that:

> "Prior to any questioning, the preson must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. *If however, he indicates in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." [384 U.S. at 444 and 445] (Emphasis added)

The Court goes on further to say:

"Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner* at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." [384 U.S. at 373] (Emphasis added)

The Court concludes:

"Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . .

. . . .

Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." [384 U.S. at 478]

This Court in its *Miranda* decision clearly indicates that once a suspect is fully appraised of his Constitutional rights and acknowledges an understanding of such rights, then the police officer, in the proper performance of his duty, may elicit voluntary statements from the suspect, unless "the individual indicates in any manner" that he wishes to remain silent or that he wishes to speak with counsel. This Court has never interpreted the Fifth and Fourteenth Amendments to require a prosecutor to show a specific affirmative oral or written waiver of the right to counsel before an incriminating statement voluntarily made by the fully warned suspect could be used as evidence against him. Neither the *Miranda* decision nor any other decision of this Court has ever imposed such a requirement on prosecutors and law enforcement agencies attempting to carry out their proper functions within the guidelines of federal law.

In *Brewer* v. *Williams*, 430 U.S. 387, 51 L.Ed. 2d 424, 97 S. Ct. 1232 (1977) this Court did not extend the principles of *Miranda* to the extent that the North Carolina Supreme Court has by its pronouncements in this case. In *Williams* this Court found that there was no evidence to support a waiver, emphasizing that *Williams* had in fact consulted with counsel and indicated he was not desirous of giving any information in the absence of his attorney. Under the principles of *Miranda*, ["If the individual indicates in any manner, . . ."] the confession in *Williams* had to be suppressed. However, this Court did not take the opportunity to establish a rule which would preclude the finding of an implied waiver in appropriate cases.

In *State of Oregon* v. *Hass*, 420 U.S. 714, 43 L.Ed. 2d 570, 95 S. Ct. 1215 (1975) this Court indicated that "a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." [420 U.S. at 719]

This Court has specifically refrained from imposing the restrictions under federal law which the North Carolina Supreme Court has seen fit to impose. Thus the decision of the North Carolina Supreme Court in this case is in direct conflict with that of this Court.

In order to guide the minds and actions of judges, prosecutors and law enforcement officers caught in this conflict and in order to insure that the federal law of the land is equally applied no more or less harshly or evenly in any one state as opposed to another, the conflict merits resolution by this Court.

B. The Supreme Court of North Carolina has decided an important question of Federal Constitutional law in a manner contrary to that of the Federal Circuit Courts and that of the Supreme Courts and Courts of Appeal of other states.

The federal circuit courts have consistently interpreted *Miranda's* provisions regarding waiver indicating that to constitute waiver of the right to remain silent or right to counsel at custodial interrogation, an express statement that the accused does not want a lawyer or that he waives his right to remain silent is not required; what the prosecution must show is that the accused was effectively advised of his rights and that he voluntarily, intelligently and understandingly declined to exercise them by word or by conduct, viewing the totality of the circumstances. The following Circuits properly recognize the doctrine of implied waiver by interpreting federal law as requiring no mandatory showing of a specific express affirmative oral or written waiver of counsel by the defendant in order to introduce his statement into evidence: First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and D.C. Federal Circuit Courts of Appeal.

Blackmon v. *Blackledge*, 541 F.2d 1070 (4th Cir. 1976) emphasizes the conflict between the North Carolina Supreme Court's interpretation of *Miranda* and the federal circuit court of this jurisdiction. Defendant Johnny James Blackmon was convicted during the March 29, 1971 Term of the Superior Court of Stanly County, North Carolina for the offense of first degree murder. The jury making no recommendation for life imprisonment, the death penalty was imposed and defendant appealed. One of the errors assigned on appeal was admission into evidence of defendant's confession. The trial court on *voir dire* had found that the defendant at the time of his arrest was fully warned of his constitutional rights under *Miranda*, that defendant "did not request . . . the presence of an attorney," that he stated "he understood his rights," and that incriminating statements made thereafter were admissible. The North Carolina Supreme Court ruled it was error for the trial judge to allow into evidence such statement because there was no showing as required by federal law, as that court interpreted *Miranda*, that the defendant had made a specific affirmative oral or written

waiver of counsel, rendering the inclusion of such evidence prejudicial error. [*State* v. *Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971)] On retrial the defendant was again convicted during the 28 August 1972 session of Superior Court in Union County, North Carolina. The confession was again offered and received into evidence. The *voir dire* testimony showed that the incriminating statements which defendant made were made in an interrogation room in the presence of police officers when defendant was confronted by a co-defendant who accused the defendant of having shot the victim. The incriminating statements resulting from the exchange between these two suspects were admitted into evidence against Blackmon. When the co-defendant had left the room and the Sheriff asked defendant, "Do you care to make any further statement?", defendant responded, "Well, I'm just going to tell you how it was." His subsequent incriminating narrative was also admitted into evidence. On this second appeal the North Carolina Supreme Court in reviewing this same confession again said, "[t]hese facts, however, are not sufficient to constitute a waiver of counsel. *There is neither evidence nor findings of fact to show that defendant expressly waived his right to counsel, either in writing or orally, within the meaning of Miranda on which our decision* in *State* v. *Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971), *is based.*" [*State* v. *Blackmon*, 284 N.C. 1, 9, 199 S.E. 2d 431, 437 (1973) (Emphasis added)] However, the court thereafter held the evidence admissible on the theory that such statements were not the result of an interrogation and were more in the nature of volunteered information. [*State* v. *Blackmon*, 284 N.C. at 12] The conviction was affirmed and case remanded for imposition of a life sentence. Blackmon thereafter proceeded by writ of habeas corpus to the Federal District Court for the Western District of North Carolina challenging his conviction through the use of such confession in violation of his federal constitutional rights. The District Court granted the writ, [*Blackmon* v. *Blackledge*, 396 F.Supp. 296 (W.D.N.C. 1975)],

but the Circuit Court of Appeals reversed, finding under the facts as previously described that there had been a compliance with *Miranda* and that Blackmon had waived counsel, stating that after proper warnings ". . . a suspect's submission to questioning without objection and without requesting a lawyer is clearly a waiver of his right to counsel. . ." [541 F.2d at 1072].

These opinions clearly focus the conflict in interpretation of federal law that exists in this jurisdiction and which requires immediate resolution.

In *United States* v. *Montos*, 421 F.2d 215 (5th Cir. 1970) the court faced the question of the admissibility of defendant postal employee's confession to mail theft made to a federal postal inspector after proper *Miranda* warnings had been given, but defendant had made no specific verbal or written waiver of counsel. In finding no error by the admission of such evidence the court stated, "An express statement that the individual does not want a lawyer is not required, however, to show that the individual waived his right to have one present. *See Bond* v. *United States*, 397 F.2d 162, 165 (10th Cir. 1968). All the prosecution must show is that the defendant was effectively advised of his rights and that he then intelligently and understandingly declined to exercise them. *See Carnley* v. *Cochran*, 369 U.S. 506, 516, 82 S. Ct. 884, 890, 8 L.Ed. 2d 70 (1962)." [421 F. 2d at 224]. Thus the court's premise of implied waiver is based on its interpretation of federal law as explained in *Carnley* v. *Cochran, supra*, decided by this court in 1962 and which continues to give guidance in this area of federal law.

The facts of other federal cases in the remaining circuits recognizing this implied waiver concept are similar to those set out in *Montos, supra* where a defendant, after proper warnings and an acknowledgment of an understanding of such rights, begins to speak without first making a specific express oral or written waiver of counsel.

See:

U.S. v. *Speaks*, 453 F.2d 966 (1st Cir. 1971);
U.S. v. *Boston*, 508 F.2d 1171 (2nd Cir. 1974);
U.S. v. *Studkey*, 441 F.2d 1104 (3rd Cir.), cert. denied 404 U.S. 841 (1971);
U.S. v. *Ruth*, 394 F.2d 134 (3rd Cir.) cert. denied 393 U.S. 888 (1968);
U.S. v. *Thompson*, 417 F. 2d 196 (4th Cir.) cert. denied, 396 U.S. 1047 (1970);
U.S. v. *Cavallino*, 498 F.2d 1200 (5th Cir. 1972);
U.S. v. *Montos*, 421 F.2d 215 (5th Cir.) cert. denied 397 U.S. 1022 (1970);
U.S. v. *Ganter*, 436 F.2d 364 (7th Cir. 1970);
Hughes v. *Swenson*, 452 F.2d 866 (8th Cir. 1971);
U.S. v. *Marchildon*, 519 F.2d 337 (8th Cir. 1975);
U.S. v. *Moreno-Lopez*, 466 F.2d 1205 (9th Cir. 1972);
U.S. v. *Hilliken*, 436 F.2d 101 (9th Cir. 1970);
Bond v. *U.S.*, 397 F.2d 162 (10th Cir.), cert. denied 393 U.S. 1035 (1969);
U.S. v. *Cooper*, 499 F.2d 1060 (D.C. Cir. 1974);
U.S. v. *McNeil*, 433 F.2d 1109 (D.C. Cir. 1974); and
Mitchell v. *U.S.*, 434 F.2d 483 (D.C. Cir.), cert. denied 400 U.S. 867 (1970).

From the foregoing it appears that the interpretation of the North Carolina Supreme Court of federal law is in complete conflict with all of the U.S. Circuit Courts of Appeal which have decided this issue, which is all such circuits except one. This clear and fundamental conflict requires immediate resolution.

An examination of the opinions of the Supreme Courts and Courts of Appeal of the various States within this United States interpreting this fundamental federal concept of law reveals that the issue of implied waiver of counsel during interrogation, presented in differing ways, has been addressed by the courts in a substantial number of states. In numerous opinions these courts have recognized from similar fact situations that federal constitutional law mandates no requirement that a properly

warned defendant, who acknowledges an understanding of such rights, specifically express either an oral or written waiver of counsel in order for the court to find a waiver implied from the totality of the circumstances surrounding the making of such statement.

The recent opinion of the Supreme Court of Georgia in *Peek* v. *State*, 239 Ga. 422, 238 S.E. 2d 12 (1977) is indicative of these state court decisions. Peek was convicted of two counts of murder and one of kidnapping. On appeal he assigned as error the admission of his confession to a sheriff who testified that defendant was informed of his constitutional rights before he made incriminating statements. The Georgia Supreme Court's interpretation of this federal question was explained as follows:

> "Although *Miranda* establishes that the accused has a constitutional right to the presence of an attorney during an in-custody interrogation, that right has been found to have been waived where the accused is informed of his rights, understands them, and then proceeds voluntarily to answer questions in the absence of counsel. See e.g., *Blackmon* v. *Blackledge*, 541 F.2d 1070 (4th Cir. 1976); *United States* v. *James*, 528 F.2d 999, 1019 (5th Cir. 1976); *United States* v. *Marchildon*, 519 F.2d 337 (8th Cir. 1975); *United States* v. *Boston*, 508 F.2d 1171 (2nd Cir. 1974) We do not construe the decision of the United States Supreme Court in *Brewer* v. *Williams*, 430 U.S. 387, as overruling the previously cited federal appellate court decisions." [238 S.E. 2d at 16]

For additional state cases recognizing the concept of implied waiver, see:

ALABAMA—*Sullivan* v. *State*, Ala. Cr. App. 351 So. 2d 659, cert. denied 351 So. 2d 665 (1977)

ARIZONA—*State* v. *Pineda*, 110 Ariz. 342, 519 P. 2d 41 (1974); *State ex rel Berger* v. *Superior Court*, 109 Ariz. 506, 513 P. 2d 935 (1973).

CALIFORNIA—*People* v. *Johnson*, 75 Cal. Rptr. 401, 450 P.2d 865 (reversed on other grounds) (1969). *People* v. *Sam*, 77 Cal. Rptr. 804, 454 P.2d 700 (1969)

COLORADO—*People* v. *Weaver*, 179 Colo. 331, 500 P.2d 980 (1972);
Reed v. *People*, 171 Colo. 421, 467 P. 2d 809 (1970).

DELAWARE—*Aaron* v. *State*, Del. Supr. 275 A. 2d 791 (1971)

FLORIDA—*State* v. *Craig*, Fla. 237 So. 2d 737 (1970)

GEORGIA—*Peek* v. *State*, 239 Ga. 422, 238 S.E. 2d 12 (1977).

ILLINOIS—*People* v. *Brooks*, 51 Ill. 2d 156, 281 N.E. 2d 326 (1972).

MAINE—*State* v. *Hazelton*, Me. 330 A. 2d 919 (1975)

MARYLAND—*Miller* v. *State*, 251 Md. 362, 247 A. 2d 530 (1968).
Burton v. *State*, 7 Md. App. 671, 256 A. 2d 826 (1969).

MASSACHUSETTS—*Commonwealth* v. *Johnson*, Mass. App. 326 N.E. 2d 355 (1975).
Commonwealth v. *Murray*, 359 Mass. 541, 269 N.E. 2d 641 (1971).

MINNESOTA—*State* v. *Nelson*, ____ Minn. ____, 257 N.W. 2d 356 (1977).

MISSOURI—*State* v. *Williams*, Mo. Cr. App. 547 S.W. 2d 139 (1977).
State v. *Alewine*, Mo. 474 S.W. 2d 848 (1972)
State v. *Burnside*, Mo. 473 S.W. 2d 697 (1971)

OKLAHOMA—*Shirley* v. *State*, Okl. Cr. 520 P. 2d 701 (1974)

OREGON—*State* v. *Davidson*, 252 Ore. 617, 451 P. 2d 481 (1969)

PENNSYLVANIA—*Commonwealth* v. *Cost*, 238 Pa. Superior Ct. 591, 362 A. 2d 1027 (1976).
Commonwealth v. *Garnett*, 458 Pa. 4, 326 A. 2d 335 (1974).

TENNESSEE—*Parks* v. *State*, Tenn. Cr. App. 543 S.W. 2d 855 (1976).
Bowling v. *State*, Tenn. Cr. App. 458 S.W. 2d 639 (1970).

VIRGINIA—*Land* v. *Commonwealth*, 211 Va. 223, 176 S.E. 2d 586 (1970) (reversed on other grounds).

WASHINGTON—*State* v. *Young*, 89 Wash. 2d 613, 574 P. 2d 1171 (1978).

These State court opinions from courts which had addressed this issue clearly are in conflict with that of the North Carolina Supreme Court in the interpretation of federal constitutional rights which will be applied to defendants being tried in the various state courts and which will govern the admissibility of evidence in such courts. This fundamental conflict between the North Carolina Supreme Court and the appellate courts of its various sister states requires immediate resolution.

CONCLUSION

The decision of the North Carolina Supreme Court with respect to the use of evidence in the prosecution's case-in-chief in a North Carolina criminal state court proceeding under an interpretation solely of federal law is in complete conflict with the decisions of this Court, with the decisions of all the federal circuit courts of appeal which have ruled on the issue, and with a

substantial number of state appellate courts. Such conflicting interpretation of federal law results in the uneven and unequal application of fundamental federal constitutional rights among the various state courts. In order to guide the minds and actions of judges, prosecutors, and law enforcement officers caught in this conflict, in order to insure that a State "not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them" [*Oregon* v. *Hass*, *supra*, 420 U.S. at 719], and to insure the equal interpretation and application of this important and fundamental issue of federal law in the various state and federal courts, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of North Carolina herein.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

LESTER V. CHALMERS, JR.
Special Deputy Attorney General

DONALD W. STEPHENS
Assistant Attorney General

Counsel for Petitioner
STATE OF NORTH CAROLINA

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-2011

APPENDIX A

IN THE
SUPREME COURT OF NORTH CAROLINA
SPRING TERM 1978

No. 87 — Wayne

STATE OF NORTH CAROLINA

v.

WILLIE THOMAS BUTLER,
a/k/a TOP CAP

Defendant appeals from judgment of Grist, J., 31 October 1977 Session, Wayne Superior Court.

Defendant was tried on separate bills of indictment charging (1) felonious assault, (2) kidnapping and (3) armed robbery, the State alleging that all three crimes were committed on 28 December 1976 in Wayne County.

The State's evidence tends to show that Ralph Burlingame was closing a Kayo station about 11 p.m. on 28 December 1976 when two black males came to the door to buy beer. They left when told that the station was closed. Burlingame completed his inventory for the day, locked up and started to his car parked nearby. The same two black males with pistols drawn then accosted Burlingame and forced him to drive them away in his own car. Defendant told Burlingame "it was a holdup" and he was going to kill him when the ride ended because he was a white boy. In a few seconds Burlingame opened the door and jumped from the

moving car. As he jumped he was shot in the back, the bullet penetrating his spinal cord and leaving his legs paralyzed. He "played dead" as he lay in the street while the robbers stopped the car 200 feet away, returned, took his wallet containing $30, shot him twice more and ran away. Shortly thereafter police officers arrived and took him to the hospital.

Within a week Burlingame positively identified photographs of defendant Butler and Elmer Lee from a twelve-photograph display. He testified in court that he was certain defendant was the man who shot him.

Defendant fled the State and was arrested in New York City on 3 May 1977 by FBI Agent David C. Martinez. Defendant was given the *Miranda* warnings, refused to sign a waiver of rights but said he understood his rights and would talk with the arresting officers. He made an incriminating statement which was admitted into evidence over objection. Defendant contended at trial, and now contends, that he never waived counsel at the in-custody interrogation by Martinez.

Defendant testified as a witness in his own behalf. He denied that he was a participant in the robbery of Ralph Burlingame and denied ever having seen Burlingame prior to a pretrial hearing held three weeks before his trial. He further denied making an admission to FBI Agent Martinez and denied that he waived any of his rights. He stated he did not know Elmer Lee and was not with him on the night of 28 December 1976 when the kidnapping and armed robbery allegedly occurred.

Defendant was convicted as charged in all three cases and given a life sentence for kidnapping, a life sentence for armed robbery and five years for the felonious assault, all sentences to run concurrently. He appealed the kidnapping and armed

robbery cases to the Supreme Court, and we allowed motion to bypass the Court of Appeals in the felonious assault case to the end that all three convictions receive initial appellate review in this Court. Defendant assigns errors discussed in the opinion.

RUFUS L. EDMISTEN, Attorney General, by THOMAS F. MOFFITT, Associate Attorney, for the State of North Carolina

MICHAEL A. ELLIS and R. GENE BRASWELL, attorneys for defendant appellant

HUSKINS, Justice:

Defendant assigns as error the admission of his inculpatory statement to FBI Agent David C. Martinez, made while in custody and without benefit of counsel. He contends the incriminating statement is inadmissible because he had not waived his constitutional right to the presence and assistance of counsel, relying on *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), as interpreted and applied by this Court in *State* v. *Blackmon*, 280 N.C. 42, 185 S.E.2d 123 (1971). This constitutes his first assignment of error and requires examination of the proceedings on voir dire and the findings of the court based thereon.

FBI Agent Martinez testified on voir dire that he arrested defendant at 1225 Sheraton Avenue in Brooklyn, New York, on a fugitive warrant on 3 May 1977. He was immediately and fully advised of his constitutional rights and transported to the New Rochelle office where he was again advised of his rights. Defendant, who had an eleventh grade education, then took the "Advice of Rights" form and read it himself. He was asked if he understood his rights and he replied that he did. As to signing the "Waiver of Rights" printed at the bottom of the

form. defendant said "he didn't want to sign this form and that he didn't want to sign anything." He was told that it was not mandatory that he talk and that he didn't have to sign the form but that "we would like for him to talk to us." Defendant replied: "I will talk to you but I am not signing any form." FBI Agent Martinez then made a notation on the form that defendant refused to sign it.

Since Defendant had stated he would talk to Officer Martinez. he was then asked "if he had participated in the armed robbery and he stated that he was there but that he did not actually participate as such in the armed robbery. We asked him to explain a little further and he stated that he and an accomplice had been drinking heavily that day and were walking around and decided to rob a gas station. They came up to a gas station where the attendant was locking up for the night and walked inside the station. He stated that the fellow with him pulled out a gun and told the gas station attendant to get in his car. He then said that the gas station attendant tried to run away and that his friend shot the attendant. At this point Mr. Butler stated that he ran away from them and didn't look back. He stated that he ran to a bus station where he caught a bus to Virginia and that in Virginia he caught another bus to New York where he had been until he was apprehended that morning. We asked him if the other person was someone by the name of Elmer Lee and we had had communications from our Charlotte office saying that Elmer Lee had also been involved. Butler said that Lee was there."

On cross-examination Agent Martinez said: "He did not say anything when I advised him of his right to have an attorney and he just sat there and listened. I repeatedly asked him if he understood his rights and he said that he did. He stated that he would not sign the paper...."

Upon further interrogation by the presiding judge, Agent Martinez said: "He never told us that he did not want the lawyer present. He never told us he did want a lawyer present.... He said 'I won't sign the form. I will talk to you but I won't sign the form.'... What made me believe that he did not want a lawyer present at that time was the fact that he was relating the story concerning the charges against him at that point. If he had wanted an attorney present with him, he wouldn't have said anything."

Based upon the evidence of Agent Martinez — defendant offered none on voir dire — the court found, among other things, that defendant's statement to Agent Martinez was made freely and voluntarily after having been advised of his rights as required by *Miranda,* including his right to an attorney, and that defendant understood his rights and "effectively waived his rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions, having read the rights form together with the waiver of rights; that the statement... was voluntarily made at a time when the defendant understood his rights...." Upon those findings the court concluded as a matter of law that defendant had knowingly waived his right to counsel and that his statement was competent evidence in the trial of the action. Defendant's first exception and assignment of error is based on this ruling. We hold that the assignment is sound and must be sustained.

Admission of defendant's inculpatory statement to Agent Martinez was erroneous because the evidence on voir dire is insufficient to support the finding that defendant waived his right to counsel. He refused to waive it in writing and the evidence on voir dire fails to show a specific oral waiver knowingly made.

In *Miranda* v. *Arizona*, supra, the United States Supreme Court said:

> "An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless *specifically* made after the warnings we here delineate have been given.... [Emphasis added.]
>
> * * * *
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained....
>
> * * * *
>
> After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

384 U.S. at 470, 475, 479, 16 L.Ed.2d at 721, 724, 726, 86 S.Ct. at 1626, 1628, 1630.

In *Carnley* v. *Cochran*, 369 U.S. 506, 516, 8 L.Ed.2d 70, 77, 82 S.Ct. 884, 890 (1962), the United States Supreme Court said:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

Measured by *Miranda* standards it is apparent that the findings of fact are not supported by the voir dire testimony of Agent Martinez. Failure to request counsel is not synonymous with waiver. Nor is silence. *Compare State* v. *Siler*, 292 N.C. 543, 234 S.E.2d 733 (1977). The trial judge erred in holding that since defendant had been fully informed and understood his right to the presence of counsel at the in-custody interrogation and did not request a lawyer, his act in making the statement amounted to a waiver of counsel. The holding in *Miranda* as interpreted and applied by this Court in *Blackmon* provides in plain language that waiver of the right to counsel during interrogation will not be recognized unless such waiver is "specifically made" after the *Miranda* warnings have been given.

Although there is other evidence amply sufficient to support a conviction in this case, the statement made by defendant to Agent Martinez placed him at the scene of the crime in company with Elmer Lee with whom defendant had agreed to rob a gas station and describes the attempted robbery. This statement alone would have been sufficient to convict defendant of armed robbery at least. There is a reasonable possibility that defendant's statement might have contributed to his conviction. Therefore, we cannot say beyond a reasonable doubt that the inculpatory statement did

not materially affect the result of the trial to defendant's prejudice or that it was harmless error. *See Chapman* v. *California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967); *Fahy* v. *Connecticut*, 375 U.S. 85, 11 L.Ed.2d 171, 84 S.Ct. 229 (1963); *State* v. *Taylor*, 280 N.C. 273, 185 S.E.2d 677 (1972); *State* v. *Blackmon*, 280 N.C. 42, 185 S.E.2d 123 (1971). The State argues for harmless error, relying on *State* v. *Hudson*, 281 N.C. 100, 187 S.E.2d 756 (1972), *cert. den.* 414 U.S. 1160 (1974), but that case is factually distinguishable. Error in the admission of defendant's incriminating statement to Agent Martinez requires a new trial.

Defendant's remaining assignment alleging error in allowing the district attorney to ask leading questions is without merit and requires no discussion.

For the reasons stated defendant is entitled to a new trial in each case and it is so ordered.

NEW TRIAL.

A TRUE COPY
JOHN R. MORGAN
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA

/s/ Mrs. Peggy N. Byrd
DEPUTY CLERK
23 August 1978

CERTIFICATE OF SERVICE

I hereby certify that I am Assistant Attorney General for the State of North Carolina; that I have served copies of the within PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA by depositing copies of same in the United States Mail at Raleigh, North Carolina, first class postage paid, addressed to:

Mr. R. Gene Braswell
Attorney at Law
231 E. Walnut Street
Goldsboro, North Carolina 27530

Mr. Michael A. Ellis
Attorney at Law
615 Park Avenue
Goldsboro, North Carolina 27530

This 30th day of August, 1978.

/s/ _____
DONALD W. STEPHENS
Assistant Attorney General

COUNSEL FOR THE STATE OF
NORTH CAROLINA, PETITIONER

APPENDIX

IN THE

Supreme Court of the United States

DECEMBER TERM, 1978

No. 78—354

STATE OF NORTH CAROLINA,

Petitioner,

v.

WILLIE THOMAS BUTLER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED AUGUST 30, 1978
CERTIORARI GRANTED DECEMBER 11, 1978

INDEX

Page

RELEVANT DOCKET ENTRIES A-1

NARRATIVE SUMMARY OF VOIR DIRE EXAMINATION CONCERNING ADMISSIBILITY OF RESPONDENT'S CONFESSION A-2

TESTIMONY OF FBI AGENT DAVID C. MARTINEZ IN THE PRESENCE OF THE JURY A-23

JUDGMENT AND OPINION OF THE SUPREME COURT OF NORTH CAROLINA A-40

CERTIFICATE OF SERVICE

Supreme Court of the United States

December Term, 1978

No. 78-354

STATE OF NORTH CAROLINA,

Petitioner,

vs.

WILLIE THOMAS BUTLER,

Respondent.

RELEVANT DOCKET ENTRIES

(1) October 24, 1977. Grand Jury Indictment handed down for the crimes of assault with a deadly weapon with intent to kill inflicting serious bodily injury [N.C. Gen. Stat. §14-32(a)], kidnapping [N.C. Gen. Stat. §14-34], and armed robbery [N.C. Gen. Stat. §14-87].

(2) October 24, 1977. Arraignment was held on the above-listed charges, and the Respondent plead not guilty.

(3) November 2, 1977. Judgment of guilty entered upon jury verdict of guilty to each of the above-listed charges.

(4) June 6, 1978. The Supreme Court of the State of North Carolina filed the judgment and opinion reversing the Respondent's conviction and remanding his case to the Superior Court for a new trial.

(5) August 30, 1978. Petition for Certiorari filed by the State of North Carolina.

(6) December 11, 1978. Petition for Certiorari granted.

NARRATIVE SUMMARY OF THE *VOIR DIRE* EXAMINATION CONCERNING ADMISSIBILITY OF RESPONDENT'S CONFESSION

IN THE SUPERIOR COURT, WAYNE COUNTY, NORTH CAROLINA

OCTOBER 31, 1977 TERM

[p. 6]

VOIR DIRE EXAMINATION

DAVID C. MARTINEZ

DIRECT EXAMINATION:

My name is David C. Martinez and I am a Special Agent with the Federal Bureau of Investigations and I

have been with them for two years. I am stationed in New York and as to Willie Thomas Butler on May 3rd, 1977, I knew that there was an unlawful flight to avoid prosecution warrant issued for Willie Butler out of Charlotte. We located Mr. Butler's residence at 1225 Sheridan Avenue and arrested him one morning. Six other agents and I went to arrest him and he was on the fifth Floor of the apartment building asleep on a cot in the kitchen when we arrested him.

We knocked on the door, identified ourselves, and stated that we had a warrant for Mr. Butler. The person inside the apartment opened

[p. 7]

the door for us and I do not know who that person was. We were allowed into the apartment and we asked where Willie was and they pointed in the direction of the kitchen and he was the only person in the kitchen. We went in the kitchen and woke Mr. Butler up and told him that he was under arrest by the FBI for unlawful flight to avoid prosecution.

After that, we immediately advised him of his rights as to the Advice of Rights Form that we had and transported him to the New Rochelle Office. We advised him of his rights first at the scene of the arrest and again when we got him back to the office and there we gave him an Advice of Rights form to execute.

As to advising him at the scene of the arrest, I have a small form that I carry in my billfold at all times and this is what I read to him. I read to him:

"Before we ask you any questions, you must understand your rights. You have the right to remain silent; anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questions if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer."

The only question that we asked him at that time was whether or not he had any weapons in the apartment and he said no. After a quick review of the area within his reach, we found no weapons and then we left the apartment and took him to the New rochelle Office

[p. 8]

of the FBI.

As to whether any agents asked him any questions about the offense that allegedly had occurred in North Carolina, I was with him in the back seat and there was another agent driving. We tried to avoid asking him any questions concerning the incident until we got back to the office. We did ask him what he had done the night before because we raised quite a commotion at the door. We tried to avoid asking any questions relating to

the commission of the crime in North Carolina until we got back to the office and we did avoid it.

During the trip to the office, he was very quiet and he seemed to accept the fact that we had arrested him and he offered no resistance. He knew who we were and I think he knew what was going on. At the office, Special Agent, Richard Berry and I took Butler up to an interview room and gave him the Advice of Rights form which he read. There were not any papers served on him at any time and the papers on the unlawful flight to avoid prosecution were forwarded to the United States Marshall in New York. I gave him the Advice of Rights form in the room and I observed whether or not he read it. I read it and I don't recall if I read it orally to him.

I asked him whether or not he could read and when he replied that he could read, I gave it to him. He read it. At the bottom it has a small statement advising him that it is a waiver of rights and if he wanted to sign it. He said the he did not want to sign any paper but he did consent to talk to us. He consented to talk to us without his lawyer present and if you showed me one of the Advice of Rights forms, I would be able to recognize it. I have the original form with me.

[p. 9]

At this point, State's Exhibit on Voir Dire No. 1 was marked and handed to the witness.

I recognize State's Exhibit No. 1 and it is the Advice of Rights form provided to Mr. Butler. Special Agent Berry was with me when I provided this form to Mr. Butler and it was around 7:18 a.m. I asked Butler if he read the form and he nodded his head and said that he had. I asked him if he understood it and he said that he did. As to signing it, he said that he didn't want to sign this form and that he didn't want to sign anything. We told him that it was not mandatory that he talk to us and that he didn't have to sign the form but that we would like for him to talk to us. He said "I will talk to you but I am not signing any form."

We had not asked him any questions about what had occurred in North Carolina before he said that he would talk to us. The reason for that was that we had communications back in the office that gave us a little more detail about what had transpired in North Carolina.

I witnessed the form after he had refused to sign it along with Special Agent Berry. I made the notification that the defendant refused to sign the form.

At this point, State's Exhibit on Voir Dire No. 1 was offered into evidence and was received into evidence.

We asked him some questions about what had occurred in North Carolina after he told us that he would talk to us. We asked him first of all if he had participated in the armed robbery and he stated that he was there but that he did not actually participate as such

in the armed robbery. We asked him to explain a little further and he stated that he and an accomplice had been drinking heavily that day

[p. 10]

and were walking around and decided to rob a gas station. They came up to a gas station where the attendant was locking up for the night and walked inside the station. He stated that the fellow with him pulled out a gun and told the gas station attendant to get in his car. He then said that the gas station attendant tried to run away and that his friend shot the attendant. At this point, Mr. Butler stated that he ran away from them and didn't look back. He stated that he ran to a bus station where he caught a bus to Virginia and that in Virginia he caught another bus to New York where he had been until he was apprehended that morning.

We asked him if the other person was someone by the name of Elmer Lee and we had had communications from our Charlotte office saying that Elmer Lee had also been involved. Butler said that Lee was there. Butler said that this occurred in the evening and I don't remember whether he said a time or not. He did not say whether the gas station attendant ever got into the car and he did not say where the attendant was when he attempted to flee and was shot. He did not tell me anything else that I recall right now.

Before we talked to him or during the time that I was talking to him, neither I nor any of any companions

made any promises to the defendant in order to get him to talk with us. Neither me nor any of my companions threatened him in any fashion to get him to talk with us and I did not offer him any hope of reward or inducement to get him to talk with us. I did not use any sort of misrepresentation or trickery or fraud of any type to get him to talk with us and I did not use any sort of force or coercion to get him to talk with us. He was in possession of his mental and physical faculties at the time that I arrested him and transported him to my office and he did not appear to be under

[p. 11]

the influence of any alcohol or narcotic drugs during this period of time. He appeared to know where he was and what was going on about him and he appeared to respond to the questions in a sequential fashion.

CROSS EXAMINATION:

I do not recall the day that we went to arrest him and as to whether it is May 3rd, 1977, that is the date if that is the date on the 302. We were at the apartment building at 6:00 in the morning but we did not go to the door until 6:30 so that we could deploy our people. We put people on the roof and back on the fire escape and covered all of the routes of escape before we went to the door. I had been there the day before looking for Mr. Butler and we had information that he might be in that apartment building and we went and tried to see if we could locate him. I knew what he was wanted for before and it was for armed robbery and there was a federal warrant out for unlawful flight to avoid prosecution.

As to the commotion at the door, that was the noise that we ourselves made and we were knocking on the door and announcing ourselves. There were seven agents with me in all and the agent in charge was Robert Gast the assistant Special Agent in charge of the office. Mr. Butler accompanied me in the car and I was the Case Agent. Mr. Berry had been with me before and he has been with the Bureau for twenty years.

I was in charge of the interrogation and Mr. Butler did not make any statement when I advised him of his rights orally back at the apartment. He was startled because we had awakened him while he was asleep on the cot. He was a little startled when he woke up to find weapons shown.

[p. 12]

The apartment was rented out to a person by the name of Brooks as I recall and there was an older gentleman and two ladies there at that time. I did not make any recording of his statement at the time that I talked to Mr. Butler at the office and showed him the form which he refused to sign. There was not anyone else present besides Mr. Berry and I and when we started talking to him, we explained that he was wanted for armed robbery in Goldsboro. We also explained that there was a federal warrant out on him for unlawful flight to avoid prosecution and he asked us a few questions on the unlawful flight warrant. We explained to him that it was a federal warrant and that in most cases that charge would be dropped once he is

returned to North Carolina. That would be in the discretion of the United States Attorney and we asked him about his participation in the armed robbery here. We did not describe the armed robbery that we were talking about in detail at first and we asked him if he had been in any armed robbery in Goldsboro. He didn't have an answer and he just kind of sat there and we asked him if he had been involved in an armed robbery of a gas station. We said that we thought that he had been involved and he said "Well, I was there but I really didn't do anything." I can't remember his exact words but the implication was that he was along with someone else who had done it.

As to whether I ever learned what armed robbery we were talking about and whether or not it was the same one, I did, and as the interview went on, he came out with some details. We came out with more of what we knew about it and about the gas station attendant having been shot. We also came out with the fact that the filling station was in Goldsboro and that there was another person by the name of Elmer Lee and that he did know Elmer Lee. The question, "Do you know Elmer Lee?" was

[p. 13]

asked and he answered the first time that it was, he wasn't sure, or no, he didn't and then he went on relating his story and then he said "Well, I know Lee." I reduced

the statement that he gave me to writing after we got back from taking him to the Southern District. I did not ever ask him to read it and I did not ever see him again.

He did not say anything when I advised him of his right to have an attorney and he just sat there and listened. I repeatedly asked him if he understood his rights and he said that he did. He stated that he would not sign the paper and I did not tell him that if he would talk to us that I would get the unlawful flight charge dropped. We had already explained to him that that was usually done in these cases. I did not ever talk to him about it being easier for him if he would talk and I don't see how it would be easier for him at all.

As to the United States Attorney being advised of the statement he made, the United States Attorney usually gets a five-day report that we make out within five days after the arrest. I do not know whether the charge of unlawful flight has been dropped and I assume it has, but I don't know. I do not recall Mr. Butler ever asking what race the gas station attendant was and if anything we asked him that.

The following is set forth in question and answer form for purposes of clarification:

Q. All right, sir. Do you recall stating to him: "Do you know what color the gas station attendant was?" and he said "white; I don't know of any black filling

station owners;" do you remember that statement being made?

A. No, sir.

As to any statement being made concerning

[p. 14]

the race of the man that was robbed, as I recall, I asked him if the gas station attendant was white or black and he answered "white." I do not recall asking him how he knew that the attendant was white and I do not recall him making the statement that he didn't know of any black filling station owners in North Carolina. I am saying that I don't remember him saying that at all.

Mr. Berry, Mr. Butler and I were present in the room and as I recall we got through with Mr. Butler around noon at the Southern District and it usually takes about an hour to get back to the office. I reduced it to writing within about three hours after I got back to the office. I don't know if a copy is here, but I do have the original with me. I wrote the following down at that time:

> "Willie Thomas Butler, 1225 Sheridan Avenue, Apartment 5-D, Brooklyn, New York. After having been advised of the identify of the interviewing agent, the charges for the cause of his arrest and his rights as found in AFD 395, Advice of Rights Form, voluntarily provided the following information concerning the charges against him: Between ten and eleven

> p.m., Butler and another individual whom he identified as Elmer Lee were drinking heavily and walking together in Goldsboro, North Carolina, when Lee asked Butler if he wanted to rob a gas station. Butler agreed and they walked over to a gas station where the attendant was locking up for the night. Lee pulled a handgun and told the attendant to get into his own car. The attendant stated words to the effect that he did not have any money. Lee again ordered the attendant to get into his car. The attendant attempted to flee and Lee shot the attendant. Butler advised that at this time he ran from the scene to the bus station in Goldsboro, North Carolina, where he got on a bus and rode to Virginia. Upon arriving in Virginia, Butler bought a

[p. 15]

> ticket to New York where he has been since the incident occurred. He has been staying with friends at 1225 Sheridan Avenue, Apartment 5-D, Bronx, New York."

As to whether Butler identified the other person as being Elmer Lee or as to whether I identified the other person as Elmer Lee and asked Butler, Butler did it, that is, he identified the other person and named Elmer Lee to me first.

As to the case file concerning the incident, all we had at the time was a teletype from our Newark, New Jersey office giving us a brief description of the crime that had been committed in North Carolina and advising us that warrants had been issued for Mr. Butler. The brief description mentioned Elmer Lee and it had that name in there. After he made that statement, we just engaged in light conversation about what he had been doing and where he had been the night before. As I recall, he said that he had been partying the night before and he did not appear to have an odor of alcohol on his breath.

At this point, the following transpired:

COURT: I understood Mr. Martinez to say on direct examination that he read him the rights form and he consented to talk with him without a lawyer being present?

MR. JACOBS: Yes, sir.

COURT: On cross examination, I understood him to say that he didn't say anything when he was asked about a lawyer. I may not have heard it properly.

MR. JACOBS: I think if he could come back to the stand, we could straighten it out. He said he was talking about two separate occasions.

COURT: I understand our Supreme Court has

[p. 16]

said that if there is not a waiver of attorney, the questioning is invalid.

REDIRECT EXAMINATION:

I heard the court's question about the two different statements and when we first arrested Mr. Butler in the kitchen, we advised him of his rights orally. At that point he just listened and he did not question us about it at any time. We allowed him to get dressed and transported him to our New Rochelle office and that is when I read him the short form. He did not have a response when we advised him of his rights relative to an attorney. We advised him of his rights and then we told him to get dressed and we transported him to the New Rochelle office. When we got to the office, we gave him the form which you have seen and at that point we asked him whether or not he would like to sign the form. He said that he would not and I said "Well, you don't have to talk to us but we would like for you to talk to us; if you want an attorney, one will be appointed for you." I didn't ask him if he would sign the form, he advised us that he did not want to sign it but that he would speak to us. He told me that he would speak to me without a lawyer and as the form said he had the right to an attorney. He had the right to have an attorney with him during questioning and he had the right to consult an attorney at any time. We asked him if he understood his rights and he said that he did and we asked him if he would speak to us. I can't remember his exact words but he did say that he would speak to us but that he would not sign the form.

The following is set forth in question and answer form for purposes of clarification:

COURT: The point is understanding his rights, did he ever say unequivocally "I will waive my rights to an attorney," or

[p. 17]

anything that would amount to that and then say, "Knowing that I am entitled to a lawyer to be here, I will not require the attorney to be present at this time and I agree to answer your questions"? Did he ever specifically say he did not want his lawyer and that he would answer the questions without a lawyer present?

A. He never told us that he did not want the lawyer present. He never told us he did want a lawyer present. We explained to him that he could have a lawyer; that one would be appointed if he so desired. At this point we asked him, "Will you speak to us knowing full well that you do have these rights?"

COURT: And he said what?

A. He said "I won't sign the form. I will talk to you but I won't sign the form." My impression was that he did understand his rights. He did not necessarily want the lawyer but he would refuse to sign any type of paper at all.

COURT: That was your impression that he did not say that?

A. He never came out with the specific words like you did.

COURT: Anything to that equivalent? As I say anything equivalent to that. The way I said it was the most understandable I suppose: unequivocal way he said it. It can be said in many different ways but if he didn't say it in any way. Anything further?

RECROSS EXAMINATION:

I am not assuming by his silence that he did not want a lawyer and it was through his answer to us saying after he had read the form and after he had been advised orally of his rights knowing full well that he had the right to an attorney and knowing that this would hold through, hold true throughout the

[p. 18]

interview that he would speak to us and that he refused to sign the form. The only refusal I understood that he refused to sign the form. I did not read that he refused to sign the form and Butler did not request a lawyer later on in my presence. I wasn't present at the extradition hearing and there was a removal hearing. He had Legal Aid lawyers for that hearing and as to whether I recall him making the statement that he wasn't going back to North Carolina voluntarily and that he wanted a lawyer, I recall him saying that he didn't want to go back to North Carolina.

He never asked me for any attorney and I never told him that I would get him an attorney for his removal hearing. I told him one would be appointed for him and the United States Magistrate of the Southern District appoints the Legal Aid lawyer for him. As to telling him that an attorney would be appointed for him at that time, he said that would be all right.

As to whether he made a statement or as to whether I just handed him the piece of paper and asked him to read it, when I got back to the office I handed him the form. I asked him if he could read and write and he said that he could. I told him to read this and he took it and read it and then he handed the form back to me. I asked him if he understood it. He had had eleven years of education as I recall, he provided us with that information during the interview. I recorded that piece of information and I have it with me here in the courtroom. After he provided us with that information, we asked him if he had any questions concerning the charges or the interview or anything at all that we might be able to answer for him. He just made the state "No, I won't sign it but I will talk to you." In the waiver of rights, it says "I don't want a lawyer at this time." Had he signed that he would have waived the lawyer

[p. 19]

lawyer unequivocally.

The following is set forth in question and answer form for purposes of clarification:

COURT: But you cannot say without your assuming that he waived an attorney by what is written down here that he consented to talk without a lawyer present; that was a conclusion that you drew from the fact that he did not specifically request an attorney, is that right?

A. Not quite, your Honor. What made me believe that he did not want a lawyer present at that time was the fact that he was relating the story concerning the charges against him at that point. If he had wanted an attorney present with him, he wouldn't have said anything.

COURT: Well, that is a mental process on your part with you concluding that he would not have wanted an attorney or he wouldn't have started talking, is that what you're saying?

A. Basically. After being on several arrests and seeing several people decide not to sign the form and decide not to say anything until they got a lawyer.

FINDINGS ON VOIR DIRE EXAMINATION

The State proceeded to offer evidence on a voir dire hearing relative to the admissibility of certain statements made by the defendant, William Thomas Butler to David C. Martinez, Special Agent of the Federal Bureau of Investigation, and the Court makes the following findings of facts:

That on or about May 3, 1977, Agent Martinez, together with other agents went to a 5th floor

[p. 20]

apartment building in the Bronx, New York, and knocked on a door and gained entrance to the apartment; that the defendant, Butler was present in the apartment and was placed under arrest at that time for unlawful flight to avoid prosecution, the agent having information at that time that the defendant had allegedly committed an offense of armed robery in the State of North Carolina; that the defendant was advised of his rights orally at the time of the initial arrest in New York City, and was advised that he had the right to remain silent; that anything he said could be used against him in court, and that he had the right to talk to a lawyer for advice before any questions were asked but if he could not afford an attorney that one would be appointed for him before any questioning; that if he decided to answer questions without a lawyer present that he could stop at any time and would have the right to have an attorney appointed for him at that time.

Having been warned of his rights as required by the Miranda Decision, the defendant made no statements nor was he asked any questions at the time of the initial arrest of the defendant; that the defendant was

subsequently transported by Agent Martinez to the New Rochelle, New York office of the FBI where the defendant was taken to an interrogation room where he was presented with State's Exhibit 1 on Voir Dire, the paper writing entitled "Your rights;" that it had been previously determined by Agent Martinez that the defendant had an Eleventh Grade Education and that he could read and write; that State's Exhibit Number 1 on Voir Dire indicates the rights as shown thereon as follows:

> "Before we ask you any questions you must understand your rights. You have the right to remain silent; anything you say can be used against you in Court; you have the
>
> [p. 21]
>
> right to talk to a lawyer for advice before we ask you any questions and to have him with you, during the questioning; if you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer."

The form also provides in the middle thereof the designation "Waiver of Rights." The Waiver reads:

> "I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

Having presented this form entitled "Advice of Rights," and subdivision "Your Rights" and "Waiver of Rights," the defendant proceeded to read the form and upon conclusion of his reading the form indicated that he did not desire to sign the form but that he would make a statement to the agent which he proceeded to do as appears of record.

Based upon the foregoing, the court is of the opinion and concludes that the statement made by the defendant, William Thomas Butler, to Agent David C. Martinez, was made freely and voluntarily to said agent after having been advised of his rights as required by the Miranda ruling, including his right to an attorney being present at the time of the inquiry and that the defendant, Butler, understood his rights; that he effectively waived his rights, including the right to

[p. 22]

have an attorney present during the questioning by his indication that he was willing to answer questions, having read the rights form together with the Waiver of Rights; that the statement made by William Thomas Butler following the agent's advising him of his rights was voluntarily made at a time when the defendant understood his rights and that no promises or offers of leniency nor threats or pressure or coercion of any type has been exerted against the defendant, and that any statement or confession so made was freely and voluntarily given;

Based upon the foregoing, the court is of the opinion and rules as a matter of law that any statement made by William Thomas Butler in the presence of Agent David C. Martinez, after having been advised of his rights may be received in evidence in the trial of this action.

EXCEPTION NO. 1

NARRATIVE SUMMARY OF THE TESTIMONY OF FBI AGENT DAVID C. MARTINEZ IN THE PRESENCE OF THE JURY

IN THE SUPERIOR COURT, WAYNE COUNTY, NORTH CAROLINA

OCTOBER 31, 1977 TERM

[p. 79]

DAVID C. MARTINEZ

My name is David C. Martinez and I live in Stanford, Connecticut. I am a Special Agent with the Federal Bureau of Investigation. I had occasion to see the defendant in the area of New York and I am a special agent with the FBI and I have been so employed for two years. I am assigned to the New York office and on May 3, 1977, I had occasion to see Willie Thomas Butler. I arrested him on that date and he was in an apartment at 1225 Sheridan Avenue in the Bronx, Apartment 5-D. We went to the building about 6:00 in the morning and arrested him at 6:30 in the morning. We had a warrant for him from Charlotte for unlawful flight to avoid prosecution and the federal warrant had been issued out of Charlotte because of a request for help from the local police saying that they had reason to believe that he had fled the state to avoid prosecution and that they would extradite him if he were found. An FBI office is in Charlotte.

[p. 80]

We got to the building in the Bronx at 6:00 and went into the apartment at 6:30. We were allowed in by a person that was living at the apartment and we knocked on the door. I had identified us as FBI Agents and stated that we had a warrant for Butler's arrest. We went inside and the defendant was asleep on a cot in the kitchen and we woke him up. We told him he was under arrest and that there were warrants outstanding for him.

We advised him of his rights and I have a card that I carry with me that I have here. The card reads as follows: Before we ask you any questions you must understand your rights. You have the right to remain silent; anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford to employ a lawyer, one will be appointed for you before any questions if you wish. If you decide to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

After this, we transported him to the New Rochelle office of the FBI which was about six miles. It took about 15 minutes to get there and he was awake and unharmed when we got there. He had all his faculties and he appeared to know who I was and what was going on about him. He appeared to be in possession of his mental and physical faculties and he did not appear to be under the influence of any alcoholic beverage or narcotic drugs.

We interview him and before that we provided him with an advice of rights form which is known to us as a FD-395. That form has exactly the same wording along with another sentence which is a waiver. I asked him to read that form and I asked him if he could read and

[p. 81]

write. He said that he could and I provided him with the form and asked him to read it. He took the form, read it, and delivered it back to me. I asked him if he read it and he said that he did. I asked him if he would sign the form and he said that he would not sign the form but that he would speak to us. As to whether we asked him any questions about his presence in Goldsboro on December 28th, 1976, I can't remember the exact date. I asked him about being in Goldsboro and about being involved in an armed robbery and he stated that there was an armed robbery that he and Elmer Lee had committed. He said that they were walking one evening after having had several intoxicating beverages and that they were drinking heavily and walking along. I cannot recall the exact time that he said that they were taking this walk and I have it written down if I may refresh my memory. It was between 10:00 and 11:00 p.m.

Q. And what did he say Lee asked him?

MR. BRASWELL: Objection

COURT: Overruled.

A. Lee asked Butler if he wanted to rob a gas station.

EXCEPTION NO. 7

The defendant told me that he agreed and they walked over to a gas station where an attendant was

locking up for the evening. He said that Lee pulled a handgun and ordered the attendant to get into the attendant's car and he said that the attendant said that he had no money. He then stated that the attendant made a break for it and that Lee shot at the attendant. Mr. Butler said at this point, he ran from the scene to the bus station and boarded a bus for Virginia and upon arriving in Virginia he boarded another bus into New York City where he had been since the incident occurred. He said that he had been staying at 1225 Sheridan Avenue since the incident and he did not say where the attendant was at the time the attendant was shot. He did not tell me anything else about the incident and I do not have any idea how long he was in New York after I arrested him. I have not seen him again since this courtroom and I see the man in this courtroom that I interviewed in New York after arresting him in the Bronx. He is sitting at the defense table.

CROSS EXAMINATION:

The unlawful flight prosecution allegedly grew out of an incident that occurred in Goldsboro and there was a warrant outstanding against the subject that was suspected of being in an armed robbery. As to whether the FBI became involved because of the fact that there had been an unlawful flight across state lines, it was through a request from the police department and in that request they must provide any background information concerning the suspect and that they will extradite him from whatever state he is found in back to the state that wants him and providing information and anything else that will be of assistance and must also show that they suspect him of crossing state lines and

where he went. They must also state on what they based that and they give a summary of what someone has told them as to what allegedly occurred such as somebody being robbed on a certain night and being shot and as a result someone has fled the state and is believed to be living in your area.

They give names and places and dates. I did not have all that information when I went to arrest Mr. Butler and the only information I had was through our Newark, New Jersey office which had sent a teletype to New York advising us that they believed him to be in the Bronx and provided us with an address. It had a very brief description of the crime and I do not have it with me. The description

[p. 83]

related that it involved a service station and that an attendant was shot and it gave the name of Elmer Lee as being one of the ones that was suspected. One of the names was Butler.

We determined who lived there at the time we went around to the apartment and there was a family by the name of Brooks living in the apartment. At the time of the arrest there were four people in the apartment which was two males and two females. We did not ascertain the age of the people and we only took Mr. Butler and left the other people there. I saw the other three people and I would approximate the age of the other male as in his mid-fifties and the two ladies at

close to their fifties. Butler did not at any time tell me that his mother lived there and I asked him. He did not tell us that his mother was there and we did not determine whether she was there.

We orally advised him of his rights at the apartment and he did not make any statement. He did not say anything like that he would talk to us or that he would not talk to us. As to what he did when we read him his rights, first of all, he was startled to find us there when he woke up and his first thought I would assume would be not to do anything that would jeopardize his welfare. He did not resist in any manner and as to whether we waited for him to answer whether or not he understood his rights, we read him his rights and did not ask him anything at all. At the bottom of the form it states "You must understand these rights" but I only read him his rights and I did not read the waiver. When I ask him he said he did.

As to the question, "Do you understand that you have the right to have an attorney" and as to the statement "If you cannot afford one, we will see that one is appointed for you,"

[p. 84]

he had no response at all. From there we escorted him to the New Rochelle office and immediately upon arriving there, we placed him in an interview room. It is known as an interview room and it has been known to be used for interrogation but we preferred to use

interview. It has always been used that way and as to whether it doesn't sound as forceful, it could be. We talked to him in that room and I told him about the unlawful flight warrant. I told him that the charge of unlawful flight to avoid prosecution is normally dropped if he went back to North Carolina. This was before I talked to him or before he made any statement to me.

After that I handed him this form that had the rights on it and I believe it has been entered as an exhibit. It reads as follows:

> "Interrogation — Advice of Rights. Your rights. Before we ask you any questions, you must understand your rights. You have the right to remain silent; anything you say can be used against you in court; you have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning; if you cannot afford a lawyer one will be appointed for you before any questions if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer. Waiver of Rights: I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I don't want a lawyer at this time. I understand and know what I am doing; no

> promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

[p. 85]

He did not sign that and I previously asked him if he could read or write and he said that he could. I asked him had he read that. As to whether I stated earlier that after he read that, he just said that he wouldn't sign it, he did refuse to sign it. As to whether I have not indicated at any time that he said "I understand it" I believe he did.

The following is set forth in question and answer form for purposes of clarification:

Q. My question is directly Mr. Martinez: did he ever state to you "I understand that; I know what it is but I'm not going to sign it;" did he ever state that in those words?

A. His words as best as I can recall when we asked him "do you understand the rights?" He nodded his head. He didn't say a word. We asked him, "Will you sign the form?" He said "I won't sign the form; I will talk to you but I won't sign the form."

At the time he refused to sign the form and he gave me a statement immediately after that. As to whether this is the time that he told me that he had been with Elmer Lee and that he had been walking around drinking and that they went to the station and that he

didn't take part in any robbery but that Lee shot the man and that he ran away, he said that Lee shot at the attendant but he didn't tell me that Lee hit the man. He did not tell me that Lee hit the man but that Lee shot at the man.

I asked him if he knew what color the service station operator was and he replied that he was white and he did not say "I am sure he is probably white because I don't know any black filling station owners in North Carolina." He did not ever make that statement that I remember and I can't recall asking him "Well, how do you know he was white?"

[p. 86]

He never made the statement "I assume he is white if he is from North Carolina" that I recall. He refused to sign this and we asked him some more questions to provide background information. He did that and I did not ever go back and ask him to sign that again.

I transcribed what he stated to me there into a written statement later that afternoon and I did not present it to Butler for his signature. I did not read it back to him and ask him if it was correct.

We took Mr. Butler to the Southern District about noon that day and to the best of my recollection, I started transcribing what he said to me about 3:00 that afternoon. As to whether I dictated it to someone else, I wrote it in the form of a rough draft and handed it to a

stenographer. I wrote it and I made some notes while he was talking. I have those and you may see them and I also have the arrest log. This is what I wrote down at the time that I was talking to Butler and I did not put any date or any time on it. I did not ask him to sign that and I did not show it to him at any time.

The following is set forth in question and answer form for purposes of clarification:

Q In there did you use the personal pronoun as Butler is talking, that "I and Elmer" or "Elmer and myself" or "Elmer Lee and me" or did you use it as the subject?

A. The subject.

I did not know who Elmer Lee was at the time that I was talking to Butler but we knew that another person by that name had allegedly been involved in the armed robbery. I did know the name but I didn't know him personally. He identified the person as being Elmer Lee and we more or less verified it to him in that we stated words to the effect that

[p. 87]

we knew Elmer Lee was there. He had no response to that.

We did not at the time that we were interviewing him recite to him what had occurred and ask him if that is what occurred and we did not at any time show him or ask him to sign any statement indicating that he had been involved in this matter. The only thing I asked him to sign was the advice of rights form and he never did ask us for a lawyer. As to his getting a lawyer later on in New York, I know that one was appointed for him for the purpose of the identity removal hearing.

I did not meet Mr. Stocks until I got to North Carolina and we did not advise anyone that I had taken a statement from that man. It is normal procedure to provide the office of origin, which is Charlotte in this case, a five-day arrest record. I forwarded a report to Charlotte within five working days after the arrest. As to whether I indicated at that time that he had failed to sign his rights and would not talk to me, no statement was made and I just put down there that the subject was arrested and the things that I have down there now.

Mr. Butler never denied being in Goldsboro on December 28th, 1976 and he stated that he was involved in the robbery. He did not tell me the location and I do not recall that I asked for the location. I was not aware that Lee was involved in more than one robbery at the time and at the time I did not know the location. It was not provided from the information and the town of Goldsboro was provided but not the street address. I told him that it happeneed in Goldsboro and he listened.

As to whether he ever stated to me that he didn't want a lawyer, he didn't use those

[p. 88]

words. As to whether he ever stated to me that he wanted to talk to me and that he would give me a written statement, there was never any mention of a written statement, but he did state that he would speak to us. I never afforded him an opportunity to sign what he said. Special Agent Richard Berry witnessed this and he did not attempt to get Butler to sign any statement in my presence. I did the talking to Butler and Berry asked him some questions. I was in there the entire time and Butler responded to Mr. Berry's questions. The statement he actually gave us was on continuous statement. We let him speak and when he finished speaking, Mr. Berry and I would ask him questions like was the attendant white or black. I think Mr. Berry also asked him if he would sign the form.

As to why we asked him if the attendant was white or black, if he had told us the details of the robbery, as I recall, there was no mention made as to whether or not the attendant was white or black in the statement. We wanted to have a statement concerning the other man to verify whether or not it was the same armed robbery and I did not know whether the man was white or black. As to verifying it, I could phone Charlotte and at the time I didn't know what I was verifying. Later on I did not ever have an occasion to go back and attempt to ask Butler any further questions and I did not ever see him again.

I did not ever make any attempt to get him to sign the statement in the future and he was fingerprinted after I talked to him and the fingerprints were not forwarded to Charlotte. The fingerprints were not forwarded to me from Charlotte at the time. As to knowing that this was Willie Thomas Butler, he told us that he was Willie Butler at the time of the arrest. I had a photograph with me and

[p. 89]

I do not have it with me now. I recall what the photograph looked like and I believe it is the same one that was in the photospread. It was a facsimile of the photograph which is something like a xerox or a teletex.

Mr. Butler made no attempt to resist at all and I do not know of any unlawful flight charge on a person known as Elmer Lee. I was not aware of Lee's whereabouts on May 3, 1977 and I do not recall that I told Butler at the time that I did not know where Lee was or whether or not Lee had been arrested. He did not ask anything about Lee and he may have denied knowing Lee.

REDIRECT EXAMINATION:

As to interviewing the defendant, we did ask him questions and once he began speaking we just let him speak. We wrote down exactly what he said with the exception of putting in the word "subject" instead of

saying "I". The notes that I showed to the defense counsel were the notes that I took while the defendant was speaking to me and before I made my notes and took the statement from him, I had let him read his rights. I had indicated that I had allowed him to read the rights and he began reading the rights at 7:18 a.m. He made his statement about three or four minutes after reading his rights.

At this point, State's Exhibits 8 and 9 were marked for identification.

State's Exhibit No. 8 is the waiver that the defendant refused to sign. Richard Berry was with me the full time. State's Exhibit No. 9 is my original interview notes and they are the ones that I took down as the defendant was telling me what had occurred. I did not threaten him in any fashion, I did not promise him anything and I did not use any force or coercion or trickery to get him to talk to me. He appeared to be in a good

[p. 90]

state of mind when he was talking to me.

At this point, State's Exhibits 8 and 9 were offered into evidence and received into evidence.

RECROSS EXAMINATION:

Mr. Butler was talking to me in a hesitant, low-tone of voice. As to whether we had to ask him questions to get him to go on, it was not to any great degree. We did

ask him a few questions and he seemed to be hesitant at times and we asked him to go on and that we were listening. We said words to that effect and he would continue talking. At this time, we were writing down what he was saying and I don't take shorthand. I wrote it down in longhand. As to whether I indicated anywhere in there the questions that I would ask him, there are no questions in there but I did ask him questions during that period of time.

The following is set forth in question and answer form for purposes of clarification:

Q Can you tell by looking at that what he said in response to questions or whether or not it was a question that you would ask him and that he would nod his head or indicate yes or no or what he would do?

A. This is my memory.

Q. By memory?

A. Yes, sir.

I had it written down at the time that he finished talking and I did not hand it to him. I asked him if he could read but I didn't ask him if he could read that. I did not let him see that and I did not ask him to sign it nor did Mr. Berry ask him to sign it. We folded it up and put it in the exhibit covers and they go into the file. I did not have those in there at the time and I put them in

[p. 91]

the notebook and carried them with us. At that time a teletype immediately went out advising them to discontinue and investigations and that there was an apprehension of Butler. I didn't state on there that he had made a confession.

REDIRECT EXAMINATION:

I had a brief sketch of the crime from the New Jersey office and when I first started the interview with Butler, to the best of my recollection, I had a teletype from Newark. I didn't know about Butler's whereabouts until he told me and I did not know at the time that I first started talking to Butler that he and Lee were drinking heavily that night and walking in Goldsboro. I did not start talking to him that Lee asked Butler if he wanted to rob a gas station. I did not know that they had walked over to a gas station at that time and I did not know that an attendant was locking up the station when they walked over there. I did not know that Lee had pulled a handgun and that he had told the attendant to get into the car. I found these things out because Butler told me. I did not know the attendant had told Butler that he didn't have any money. I did not know at that time that Lee ordered the attendant again to get in his car. I found that out because Mr. Butler told us and I did not know that Mr. Butler ran from the scene and got a bus until he told me. I did not know that he took a bus and went to Virginia and I did not know that he had ever been to Virginia and I did not know that he bought a ticket in Virginia for New York City.

RECROSS EXAMINATION:

It is not a practice for us when we are interviewing a suspect to recite facts back to him and what he doesn't know fill in the blanks and see whether or not we can get the man to agree to anything and I have never done that. I have never been in an investiga-

[p. 92]

tion in which I knew part of the facts and tried to get a complete story by saying "Isn't this the way it happened?" but I have heard it done by police officers. I have not heard it done by other agents. I had not been asked to see what I could obtain from this man and it is a normal procedure to interview anybody when we arrest them. I didn't give him a shorthand knowledge of what my information was at the time

---

JUDGMENT AND OPINION OF THE SUPREME COURT OF NORTH CAROLINA

The Judgment and Opinion of the Supreme Court of North Carolina is located in Appendix A of the Petition for Writ of Certiorari.

CERTIFICATE OF SERVICE

I hereby certify that I am Assistant Attorney General for the State of North Carolina; that I have served copies of the within APPENDIX by depositing copies of same in the United States mail at Washington, D.C., first class postage paid, addressed to:

Mr. R. Gene Braswell
Attorney at Law
231 E. Walnut Street
Goldsboro, North Carolina 27530

Mr. Michael A. Ellis
Attorney at Law
615 Park Avenue
Goldsboro, North Carolina 27530

This 25th day of January, 1979.

/s/ _____
DONALD W. STEPHENS
Assistant Attorney General

COUNSEL FOR
THE STATE OF NORTH CAROLINA,
Petitioner

IN THE SUPREME COURT

OF THE UNITED STATES

Term, 1978

NO. 78 - 354

STATE OF NORTH CAROLINA

VS

WILLIE THOMAS BUTLER, A/K/A
"TOP CAT"

MOTION TO PROCEED IN FORMA PAUPERIS

TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 53 of the Supreme Court Rules and pursuant to 28 U.S.C. § 1915, the Respondent, Willie Thomas Butler, by and through his attorneys, Michael A. Ellis and R. Gene Braswell, hereby moves that he be allowed to proceed in this Court in forma pauperis. Attached hereto is an Affidavit showing that the Respondent comes within the statutory requirements of 28 U.S.C. § 1915.

WHEREFORE, the Respondent prays that he be allowed to proceed in this Court in forma pauperis.

This the 13 day of October, 1978.

BARNES, BRASWELL & HAITHCOCK, P.A.

BY: Michael A. Ellis
R. Gene Braswell
Attorneys for the Respondent
P. O. Box 1582
Goldsboro, North Carolina 27530
Telephone No. 919-735-6420

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing Motion to Proceed in Forma Pauperis upon Donald W. Stephens, Assistant Attorney General, at his address at the Department of Justice, P.O. Box 629, Raleigh, North Carolina.

This the 13 day of October, 1978.

BARNES, BRASWELL & HAITHCOCK, P.A.

BY: Michael A Ellis
Attorneys for the Respondent
P. O. Box 1582
Goldsboro, North Carolina 27530
Telephone No. 919-735-6420

RECEIVED
OCT 18 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT

OF THE UNITED STATES

Term, 1978

NO. 78 - 354

STATE OF NORTH CAROLINA

VS

WILLIE THOMAS BUTLER, A/K/A
"TOP CAT"

AFFIDAVIT FOR MOTION TO PROCEED
IN FORMA PAUPERIS

TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES:

I, the undersigned, do hereby certify that I am the Appellee in the above entitled action in which the State of North Carolina is seeking review of the judgment of the Supreme Court of North Carolina granting me a new trial for failure of the arresting officer to obtain a specific oral waiver of my right to the presence of an attorney during questioning. I believe that I am entitled to redress under 28 U.S.C. § 1915 and Rule 53 of the Supreme Court Rules in that I have not been employed since 1976, and I have been incarcerated in Central Prison in Raleigh, North Carolina since November of 1977. I am presently incarcerated in the Wayne County jail in Goldsboro, North Carolina, awaiting trial in the Superior Court of Wayne County. As a result of my unemployment and incarceration, I am unable to pay the costs or give security for the expense of printing my brief.

This the 12th day of October, 1978.

Willie T. Butler
WILLIE THOMAS BUTLER

Sworn to and subscribed
before me this the 12th
day of October, 1978.

Shirley H. Braddum
NOTARY PUBLIC
My commission expires:
Nov 13, 1982

IN THE SUPREME COURT

OF THE UNITED STATES

Term, 1978

NO. 78 - 354

STATE OF NORTH CAROLINA — Petitioner

VS.

WILLIE THOMAS BUTLER,
A/K/A "TOP CAT" — Respondent

On Petition For Writ of Certiorari
To the Supreme Court of the State of
North Carolina

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL A. ELLIS
R. GENE BRASWELL

BARNES, BRASWELL & HAITHCOCK, P.A.
P. O. BOX 1582
GOLDSBORO, NORTH CAROLINA 27530
919-735-6420

Counsel for Respondent

SUBJECT INDEX

	Page
Questions Presented	2
Reasons for Denying the Writ	2
Conclusion	4
Certificate of Service	5

CITATIONS

Cases Cited

Federal

Blackmon v. Blackledge, 396 F. Supp. 296 (W.D.N.C. 1975)	4
Carnley v. Cochran, 369 U.S. 506, 82 X. Ct. 884, 8 L. Ed. 2d 70 (1962).	3
Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966)	3, 4

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1978

No. 78 - 354

STATE OF NORTH CAROLINA,

Petitioner

vs.

WILLIE THOMAS BUTLER, A/K/A
"TOP CAT"

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

The Respondent, Willie Thomas Butler, respectively prays that a Writ of Certiorari not be issued to review the judgment and opinion of the Supreme Court of the State of North Carolina entered in this proceeding on June 6th, 1978, granting him the new trial.

QUESTION PRESENTED

Does the prosecution at trial demonstrate an effective waiver of the right to counsel during interrogation when it shows that the individual being interrogated understood his rights and agreed to talk, but that the individual's waiver of the right to counsel was not specifically made after the warnings were given?

REASONS FOR DENYING THE WRIT

A. The Supreme Court of North Carolina in its decision continued to recognize that the circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators and

adhered to the specific requirements set forth in this Court's Miranda decision that there can be no effective waiver of the right to counsel during interrogation unless specifically made after the warnings have been given.

In Miranda v. Arizona, 384 US 436, 16 L.Ed. 2d 694, 86 S.Ct.1602 (1966), the United States Supreme Court said:

> "An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given . . . . (Emphasis added.)
>
> * * * *
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained . . . .
>
> * * * *
>
> After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

In short, the record just does not show that the Respondent declined counsel after he was informed of his right to have counsel present. As to this specific point of the declining of counsel, the record is silent and the presumption of a waiver from a silent record is impermissable. Carnley v. Cochran, 369 U.S. 506, 8 L. Ed. 2d 70, 82 S.Ct. 884 (1962). In that case in which the record did not show that the trial judge offered and that the accused declined counsel, this Court clearly pointed out that there must be an allegation and evidence which show that the accused was offered counsel but intelligently and understandingly rejected the offer. The Respondent contends that the Miranda decision clearly holds that the rejection of the offer of counsel or the waiver of counsel must be specifically made and can not be inferred merely from the fact that he was willing to answer questions after acknowledging

that he understood what the "Advice of Rights Form" meant. A review of the three paragraphs quoted above from the Miranda decision and a comparison of them to the facts of this case clearly indicates that there was not an effective waiver of the right to counsel by the accused since the waiver was not specifically made and can not be presumed from the facts that the accused was silent as to the specific question of whether he wanted counsel present and that the accused eventually made a statement.

Finally, the Respondent contends that the case of Blackmon v. Blackledge, 396 F. Supp 296 (W.D.N.C. 1975) cited in the petitioner's brief is in direct conflict with the Miranda decision in that it clearly infers a waiver of counsel from the fact that the accused submits to questioning and from the fact that he fails to ask for a lawyer. All of the cases cited by the petitioner from Federal Circuit Court and the Supreme Courts of other states seemingly violate the express language of the original Miranda decision that there can be no effective waiver of the right to counsel during interrogation unless the waiver is specifically made after the warnings have been given.

CONCLUSION

The Respondent respectfully prays the Court to deny the Petition for Certiorari and allow a decision to stand that affords rights that are indispensable to the protection of the Fifth Amendment privilege. Undoubtedly, some people accused of crime would, in fact, understand the right to have counsel present by reading such a form, but, undoubtedly, there are many who would not understand this right. The case at hand happens to involve an accused who did not finish high school and the only way to insure the equal application of the Fifth Amendment privilege is to require that all suspects make a specific oral or written

waiver of their right to counsel during interrogation.

Respectfully submitted,

BARNES, BRASWELL & HAITHCOCK, P.A.

BY: Richard A. Elkins

Attorneys for Respondent
P. O. Box 1582
Goldsboro, North Carolina 27530
Telephone No. 919-735-6420

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari has this date been served upon Donald W. Stephens, Assistant Attorney General, by depositing a copy of the same in the United States mail, first class postage prepaid, addressed to:

Mr. Donald W. Stephens
Assistant Attorney General
P. O. Box 629
Raleigh, North Carolina 27602

This the 11th day of October, 1978.

BARNES, BRASWELL & HAITHCOCK, P.A.

BY: Richard A. Elkins

Attorneys for Respondent
P. O. Box 1582
Goldsboro, North Carolina 27530
Telephone No. 919-735-6420

IN THE

Supreme Court of the United States

DECEMBER TERM, 1978

No. 78—354

STATE OF NORTH CAROLINA,

Petitioner,

v.

WILLIE THOMAS BUTLER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE PETITIONER

RUFUS L. EDMISTEN
Attorney General of North Carolina

LESTER V. CHALMERS, JR.
Special Deputy Attorney General

DONALD W. STEPHENS
Assistant Attorney General

THOMAS F. MOFFITT
Assistant Attorney General

ATTORNEYS FOR PETITIONER
North Carolina Department
of Justice
P. O. BOX 629
Raleigh, North Carolina 27602

DI CESARE · PRINTING / WASHINGTON, D.C. / (202) 331-8101

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

JURISDICTION 2

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW 7

SUMMARY OF ARGUMENT 11

I. INTRODUCTION 15

II. IN INTERPRETING AND APPLYING THE *MIRANDA DECISION*, LOWER FEDERAL COURTS HAVE APPLIED A TOTALITY OF CIRCUMSTANCES TEST IN DETERMINING IMPLIED WAIVER OF COUNSEL, REJECTING FURTHER EXTENSION AND EXPANSION OF *MIRANDA* 19

III. CERTAIN PORTIONS OF THE *MIRANDA* DECISION LEAD TO THE INTERPRETATION AND CONCLUSION OF THE FEDERAL CIRCUIT COURTS OF APPEAL AND THE OTHER COURTS CITED ABOVE THAT A PROPERLY WARNED CRIMINAL SUSPECT DOES NOT EXERCISE HIS RIGHT TO SILENCE UNDER *MIRANDA* UNLESS HE STANDS MUTE OR OTHERWISE CLEARLY EXPRESSES HIS DESIRE NOT TO SPEAK, AND THAT ANY OTHER CONDUCT MAY IMPLY A WAIVER OF RIGHTS TO SILENCE AND COUNSEL 24

IV. THE POLICY CONSIDERATIONS UNDERLYING *MIRANDA* AS DISCUSSED BY THIS COURT IN THAT DECISION AND IN ITS SUBSEQUENT DECISIONS SUPPORT A RULE OF LAW WHICH ALLOWS A FINDING OF IMPLIED WAIVER OF COUNSEL FROM THE TOTALITY OF THE CIRCUMSTANCES, BALANCING THE INTERESTS OF SOCIETY AND OF THE SUSPECT 28

V. IN SUBSEQUENT DECISIONS THIS COURT "HAS BEEN CONSISTENTLY RELUCTANT TO EXTEND *MIRANDA* OR TO EXTEND IN ANY WAY ITS STRICTURES ON LAW ENFORCEMENT AGENCIES" ..35

CONCLUSION 38

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Constitutional Provisions

Page

United States Constitution, Amendment V 1

United States Constitution, Amendment XIV, Section 1 1

Statutes

28 United States Code, §1257 (3) 2

N.C. Gen. Stat. §14-39 3

N.C. Gen. Stat. §14-87 3

N.C. Gen. Stat. §14-32(a) 3

Cases Cited

Page

Federal

Beckwith v. *United States*, 425 U.S. 341 48 L. Ed. 2d 1, 96 S. Ct. 1612 (1976) 38

Blackmon v. *Blackledge*, 541 F. 2d 1070 (4th Cir. 1976) 19, 22

Blackmon v. *Blackledge*, 396 F. Supp. 296 (W.D.N.C. 1975) 19

Bond v. *United States*, 397 F. 2d 162 (10th Cir.) cert. denied 393 U.S. 1035, 21 L. Ed 2d 579, 89 S. Ct. 652 (1968) 21

Brewer v. *Willians*, 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977) 27

Doyle v. *Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976) 27

Fare v. *Michael C.*, ____ U.S.____ 58 L. Ed. 2d 19, 99 S. Ct. 3 (1978) 32, 35

Harris v. *New York*, 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971) 30, 37

Hughes v. *Swenson*, 452 F. 2d 866 (8th Cir. 1971) 20, 21, 22

Michigan v. *Mosley*, 423 U.S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 321 (1975) 31, 34, 38

Michigan v. *Tucker*, 417 U.S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974) 29, 30, 33

Mincey v. *Arizona*, ___ U.S. ___
57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978) 30, 37

Miranda v. *Arizona*, 384 U.S. 436 (1966) ..... passim

Mitchell v. *United States*, 434 F. 2d 483
(D.C. Cir.) cert. denied 400 U.S. 867 (1970) 21

Oregon v. *Hass*, 420 U.S. 714, 43 L. Ed.
2d 570, 95 S. Ct. 1215 (1975) 37

Oregon v. *Mathiason*, 429 U.S. 492, 50
L. Ed. 2d 714, 97 S. Ct. 711 (1977) 37

United States v. *Boston*, 508 F. 2d 1171
(2nd Cir. 1974) 22

United States v. *Ganter*, 436 F. 2d
364 (7th Cir. 1970) 20, 21

United States v. *Hilliken*, 436 F. 2d
101 (9th Cir. (1970), cert. denied 401 U.S.
958, 28 L. Ed. 2d 242, 91 S. Ct. 987 (1971) 21

United States v. *Marchildon*, 519 F. 2d
337 (8th Cir. 1975) 22

United States v. *McNeil*, 433 F. 2d
1109 (D.C. Cir. 1969) 21

United States v. *Montos*, 421 F. 2d
215, (5th Cir.) cert. denied 397 U.S.
1022, 25 L. Ed. 2d 532, 90 S. Ct.
1262 (1970) 21

United States v. *Moreno-Lopez*, 466 F.2d
1205 (9th Cir. 1972) 21

United States v. *Ruth*, 394 F. 2d 134
(3rd Cir.) cert. denied, 393 U.S. 888
(1968) 21

United States v. *Speaks*, 453 F. 2d
966 (1st Cir. 1972) 21

United States v. *Stuckey*, 441 F. 2d
1104 (3rd Cir.), cert. denied, 404
U.S. 841 (1971) 21

United States v. *Thompson*, 417 F. 2d 196
(4th Cir.), cert. denied, 396 U.S. 1047
(1970) 21

United States v. *Washington*, 431 U.S. 181, 52 L.
Ed. 2d 238, 97 S. Ct. 1814 (1977) 27

State

Fare v. *Michael C.*, 21 Cal. 3rd 471
(1978) 32, 35

State v. *Blackmon*, 280 N.C. 42, 185
S.E. 2d 123 (1971) 6, 16, 18

State v. *Blackmon*, 284 N.C. 1, 199 S.E.
2d 431 (1973) 16, 18, 19

State v. *Connley*, 295 N.C. 327 ___
S.E. 2d ___ (1978) 16

State v. *Siler*, 292 N.C. 543, 234
S.E. 2d 733 (1977) 6

IN THE

Supreme Court of the United States

DECEMBER TERM, 1978

No. 78—354

STATE OF NORTH CAROLINA,

Petitioner,

v.

WILLIE THOMAS BUTLER,

Respondent.

BRIEF FOR PETITIONER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides:

> "No person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

Amendment XIV, Section 1 of the Constitution of the United States provides:

"... [N] or shall any State deprive any person of life, liberty, or property, without due process of law..."

JURISDICTION

From a final judgment of the Supreme Court of North Carolina entered in this case on June 6, 1978 [reported at 295 N.C. 250, 244 S.E. 2d 410 (1978)] ordering for the defendant a new trial, the State of North Carolina petitioned this Court on August 30, 1978 for Writ of Certiorari, pursuant to Rule 22(1) invoking this Court's jurisdiction under 28 U.S.C. §1257(3). Such petition for Certiorari was allowed by this Court on 11 December 1978.

QUESTION PRESENTED[1]

INTERPRETING THIS COURT'S DECISION IN *MIRANDA* v. *ARIZONA*, 384 U.S. 436 (1966), IN

[1]The *Question Presented* in the State of North Carolina's Petition for Certiorari, which has been simplified and generalized above for the purposes of this brief, was as follows:

"QUESTION PRESENTED

Interpreting this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), after being fully advised of his rights and acknowledging an understanding of such rights, in the absence of a specific affirmative oral or written waiver of counsel by a suspect under arrest and being questioned, does federal law prohibit a state trial court from finding an *implied* waiver of counsel from the surrounding facts and circumstances of the case, under the Fifth Amendment, as applicable to the State through the Fourteenth Amendment, thereby prohibiting the use by the prosecution as evidence in a state court an incriminating statement by the criminal defendant made to an agent of the FBI when arrested in another state on a fugitive warrant after the defendant had been fully advised of his constitutional rights as required by *Miranda* and then had replied to such advising FBI Agent that he understood his rights, that he "didn't want to sign anything" and that he would "talk to you but I am not signing any form", when defendant thereafter spoke freely and voluntarily in answering the agent's questions without ever requesting the presence of counsel?"

THE ABSENCE OF AN EXPRESS ORAL OR EXPRESS WRITTEN WAIVER OF RIGHT TO COUNSEL PRIOR TO QUESTIONING, DOES *MIRANDA* ALLOW A FINDING OF AN *IMPLIED* WAIVER OF RIGHT TO COUNSEL FROM THE TOTALITY OF THE SURROUNDING FACTS AND CIRCUMSTANCES OF THE CASE WHERE THE SUSPECT HAS BEEN FULLY ADVISED OF HIS CONSTITUTIONAL RIGHTS BEFORE MAKING VOLUNTARY INCRIMINATING STATEMENTS IN RESPONSE TO QUESTIONING?

STATEMENT OF THE CASE

Willie Thomas Butler was convicted upon trial by jury in Wayne County Superior Court, North Carolina for the offenses of Kidnapping [N.C. Gen. Stat. §14-39], Armed Robbery [N.C. Gen. Stat. §14-87], and Felonious Assault [N.C. Gen. Stat. §14-32(a)]. From a judgment

imposing two concurrent life sentences and a five year sentence of imprisonment which also ran concurrently, the defendant appealed to the North Carolina Supreme Court. That Court reversed such convictions and ordered a new trial finding defendant's confession, which was admitted into evidence against him, did not comply with the North Carolina Supreme Court's interpretation of *Miranda* v. *Arizona, supra.*

The State's evidence tended to show that Ralph Burlingame was closing a Kayo service station about 11:00 p.m. on 28 December 1976 in Wayne County, North Carolina, when two black males came to the door to buy beer. The two left upon being informed that the station was closed. Burlingame thereafter locked up and started to his car, but was accosted by the same two males with pistols drawn. He was forced into his vehicle and ordered to drive away at gunpoint. He was informed that "it was a holdup" and that he would be killed at the end of the ride because he was white. Upon hearing this, Burlingame opened the door and jumped from the moving vehicle. As he fled, he was shot in the back, the bullet penetrating his spinal cord and leaving his legs paralyzed. He"played dead" when the assailants stopped the car and returned to take $30.00 from his wallet and to shoot him twice more. The police found Burlingame lying in the road shortly afterwards. Two bullets, each of a different caliber, were removed from his body at the hospital. He survived, but remained paralyzed. He identified defendant's photograph along with that of the accomplice in a twelve-photograph

display a short time later. In court he was positive that the defendant was the man who shot him. [R. pp. 48 - 69][2]

After these offenses, defendant fled the State and on May 2, 1977 he was arrested in New York as a fugitive by FBI Agent David C. Martinez. Defendant was given the *Miranda* warnings by Agent Martinez at the time of his arrest and again back at the Agent's office, where Butler was asked to execute an "Advice of Rights Form". After reading the form he acknowledged that he understood what it said but he indicated that he didn't want to sign the form and he didn't want to sign anything. In response to the Agent's subsequent question of whether or not he would be willing to talk to them, defendant stated: "I will talk to you but I am not signing any form." Defendant thereafter made no express statement that he did not want a lawyer present, but he never requested a lawyer either. [R. pp. 6-19] His subsequent incriminating statement to the FBI Agents was held admissible by the trial judge who found that such statement was freely and voluntarily made after a proper *Miranda* warning and the defendant had "effectively waived his rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions," since he had read the rights form together with the

[2]The reference to "R.pp." throughout this brief refers to pages from the official certified record of this case on appeal before the North Carolina Supreme Court. The above summarized facts are located from pages 48 through 69 of the record.

waiver of rights, acknowledged his understanding of it, and chose to speak thereafter. This was assigned as error and it was this assigned error for which the North Carolina Supreme Court reversed defendant's convictions, ordering a new trial.[3] The North Carolina Supreme Court interprets *Miranda* v. *Arizona, supra,* as requiring either an express written or an express oral waiver of counsel. Citing its own prior opinions, *State* v. *Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971) and *State* v. *Siler,* 292 N.C. 543, 234 S.E. 2d 733 (1977) the Court held that a correct interpretation of *Miranda* requires that "waiver of the right to counsel during interrogation will not be recognized unless such waiver is 'specifically made' after the *Miranda* warnings have been given."[4] Thus, inclusion of defendant's incriminating statement in which he admitted drinking with a black male named Elmer Lee on 28 December 1976, agreeing with Lee to rob the Kayo gas station, accompanying Lee, who was armed, to the station, and participating in the robbery at the time Burlingame was shot, was prejudicial error requiring a new trial the Court held.

---

[3]The opinion of the North Carolina Supreme Court reported in 295 N.C. 250, 244 S.E. 2d 410 (1978) is reproduced in its entirety as APPENDIX A in the State of North Carolina's Petition for Certiorari filed in this case in the United States Supreme Court on 30 August 1978.

[4]*Butler, supra,* 295 N.C. at 254, citing *Miranda* v. *Arizona, supra,* 384 U.S. at 470.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The federal question presented herein was originally raised by Butler's timely objection at trial to the admission of any statement which he made to FBI Agent Martinez at the time of his arrest and his interrogation. Upon such timely objection, the trial court heard evidence on *voir dire* out of the presence of the jury and thereafter made the following findings of fact and conclusions of law:

> "... the Court makes the following findings of fact:
>
> That on or about May 3, 1977 Agent Martinez together with other agents went to a fifth floor apartment building in the Bronx, New York, and knocked on a door and gained entrance to the apartment; that the defendant, Butler, was present in the apartment and was placed under arrest at that time for unlawful flight to avoid prosecution, the agent having information at that time that the defendant had allegedly committed an offense of armed robbery in the State of North Carolina; that the defendant was advised of his rights orally at the time of the initial arrest in New York City, and was advised that he had the right to remain silent; that anything he said could be used against him in court, and that he had the right to talk to a lawyer for advice before any

questions were asked but if he could not afford an attorney that one would be appointed for him before any questioning; that if he decided to answer questions without a lawyer present that he could stop at any time and would have the right to have an attorney appointed for him at that time.

Having been warned of his rights as required by the *Miranda* decision, the defendant made no statements nor was he asked any questions at the time of the initial arrest of the defendant; that the defendant was subsequently transported by Agent Martinez to the New Rochelle, New York office of the FBI where the defendant was taken to an interrogation room where he was presented with State's Exhibit 1 on *voir dire,* the paper writing entitled 'Your Rights'; that it had been previously determined by Agent Martinez that the defendant had an eleventh grade education and that he could read and write; that State's Exhibit No. 1 on *voir dire* indicates the rights as shown thereon as follows:

> 'Before we ask you any questions you must understand your rights. You have the right to remain silent; anything you say can be used against you in Court; you have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during the questioning;

> if you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.'

The form also provides in the middle thereof the designation 'Waiver of Rights'. The Waiver reads:

'I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.'

Having presented this form entitled 'Advice of Rights', and subdivision 'Your Rights' and 'Waiver of Rights', the defendant proceeded to read the form and upon conclusion of his reading the form indicated that he did not desire to sign the form but that he would make a statement to the agent which he proceeded to do as appears of record.

Based upon the foregoing, the court is of the opinion and concludes that the statement

made by the defendant, William Thomas Butler, to Agent David C. Martinez, was made freely and voluntarily to said agent after having been advised of his rights as required by the *Miranda* ruling, including his right to an attorney being present at the time of the inquiry and that the defendant, Butler, understood his right to have an attorney present during the questioning by his indication that he was willing to answer questions, having read the rights form together with the Waiver of Rights; that the statement made by William Thomas Butler following the agent's advising him of his rights was voluntarily made at a time when the defendant understood his rights and that no promises or offers of leniency nor threats or pressure or coercion of any kind has been exerted against the defendant, and that any statement or confession so made was freely and voluntarily given;

Based upon the foregoing, the court is of the opinion and rules as a matter of law that any statement made by William Thomas Butler in the presence of Agent David C. Martinez, after having been advised of his rights, may be received in evidence in the trial of this action.

EXCEPTION NO. 1"

[R. pp. 19-22]

Butler's exception to this ruling was duly noted, recorded and raised when he appealed his conviction to the North Carolina Supreme Court asserting as error the admission of his confession in violation of his Federal constitutional rights. The North Carolina Supreme Court found the admission of this confession to be error and reversed, holding that federal law *(Miranda* v. *Arizona)* requires the prosecution to show that an express oral or written waiver of right to counsel was specifically made by a defendant before his incriminating statement can be used as evidence against him and that no waiver can be implied in the absence of such express specific waiver.

The Federal Question presented herein has thus been properly raised and appropriately preserved at all stages of this case.

SUMMARY OF ARGUMENT

The *Miranda* decision enunciated a series of specific protective procedural safeguards necessary to secure and insure a criminal suspect's Fifth Amendment privilege against compulsory self-incrimination during custodial interrogation. These procedural safeguards were not themselves rights protected by the Constitution, but prophylactic measures to ensure and guarantee Constitutional rights. The decision adopted an exclusionary rule as its prime sanction in the event that such prophylactic measures were not followed. The *Miranda* Court with clarity described these measures for police to follow as "concrete constitutional guidelines" in precisely

delineating the rights to which any suspect is entitled during custodial interrogation and the required warnings to be given. After the police officer has borne *Miranda's* burden of properly informing the suspect of his rights, the language of the *Miranda* Court was less than precise in what would or could thereafter constitute a waiver of such rights by the suspect. Certain portions of the opinion[5] lead to the conclusion

---

[5]A portion of the *Miranda* opinion indicated:

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. *If however, he indicates in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." [384 U.S. at 444 and 445 (emphasis added)]

. . . .

"Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner* at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." [384 U.S. at 473 and 474 (emphasis added)]

. . . .

"Our decision is not intended to hamper the traditional function of police officers in investigating crime....

that a properly warned suspect who chooses to speak voluntarily in response to questioning, who has not exercised his right to silence or counsel by indicating *in any manner* that he chooses to exercise such rights, may by his actions waive those rights, although he never does so by specific express oral or written waiver. This is the interpretation of *Miranda* which has been consistently adopted by the Federal Circuit Courts of Appeal in these United States.[6]

This Court's subsequent decisions have indicated that the prophylactic guidelines of *Miranda* were not intended to create a constitutional straightjacket to thwart police and to be used as a shield protecting killers, robbers and rapists from full disclosure of the truth to the triers of fact, but instead were intended to provide practical reinforcement of the Fifth Amendment right against self-incrimination, and protection against police improprieties of coercion,

---

....

Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." [384 U.S. at 477 and 478]

[6]See cases cited in Argument II, *Infra*, of this brief indicating that the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th, 10th and District of Columbia Federal Circuit Courts of Appeal recognize the doctrine of implied waiver of *Miranda* rights.

brutality, physical and psychological pressure, and overbearing in obtaining confessions.[7] This Court has indicated that it will not be bound by literal interpretations of some portions of the *Miranda* Court's opinion in such a way as to lead to an absurd and unintended result, which could "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity..."[8] The Court has determined since *Miranda* that violation of a prophylactic guideline does not necessarily require *per se* exclusion of an otherwise voluntary confession in all cases, so long as the confession was not the product of willful or negligent police conduct amounting to bad faith and unfair police activity.[9]

This Court has, since *Miranda*, declined to extend or expand its requirements and has evidenced an overall effort to "contain *Miranda* to the express terms and logic of the original opinion."[10]

---

[7] *Michigan* v. *Tucker*, 417 U.S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974).

[8] *Michigan* v. *Mosley*, 423 U.S. 96, 102, 46 L. Ed. 2d 313, 320, 96 S. Ct. 321, ___ (1975).

[9] *Michigan* v. *Tucker, supra; Michigan* v. *Mosley, supra.*

[10] *Fare* v. *Michael C.*, ___ U.S. ___, 58 L. Ed. 2d 19, 24, 99 S. Ct. 3, 5, (1978).

The State of North Carolina respectfully submits that *Miranda* v. *Arizona*, by its language and principles as explained by the *Miranda* Court in its opinion and as explained and interpreted by this Court in subsequent opinions, establishes no mandatory requirement that a properly warned suspect make a specific express oral or written waiver of his rights before custodial interrogation can commence, as a prerequisite to the admissibility of any voluntary confession. If the totality of the circumstances show that the suspect was properly warned of his rights, that he was subjected to no undue police pressure or unfair police activity, that he responded to questioning without objection or expression of a desire to remain silent or to have counsel present, and that his choice to respond was a product of his own volition, then "waiver is implicit in such circumstances, for it is quite inconsistent with an assertion of a known right."[11] Such an implied waiver would violate neither the mandate nor the purpose of *Miranda*.

ARGUMENT I

INTRODUCTION

The North Carolina Supreme Court has consistently interpreted the requirements of *Miranda* v. *Arizona, supra,* to include a mandatory showing of a

---

[11] *Blackmon* v. *Blackledge*, 541 F. 2d 1070, 1073 (4th Cir. 1976).

specific express affirmative oral or written waiver of counsel by a suspect prior to the admissibility of any voluntary statements by such suspect made during in-custody interrogation. The opinions of that Court in *State* v. *Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971) *appeal from retrial* at 284 N.C. 1, 199 S.E. 2d 431 (1973); *State* v. *Butler, supra; State* v. *Connley,* 295 N.C. 327, ____ S.E. 2d ____ (1978) [State's Petition for Certiorari filed on 6 October 1978 is now pending before this Court][12] based solely on that Court's interpretation of federal law, leave no question but that the court will apply a *per se* rule of exclusion in the absence of a specific express waiver, irrespective of the totality of the surrounding circumstances, in determining effective waiver of counsel. [13] The

[12]The State of North Carolina petitioned the United States Supreme Court on 6 October 1978 (No. 78-582) for review of the North Carolina Supreme Court's reversal of a first degree murder conviction of Ruben Sonny Connley for the killing of a Virginia State Highway Patrol Trooper. Connley's response to *Miranda* warnings given by an FBI Agent indicated an acknowledgment and an understanding of his rights and also a willingness to talk, but a refusal to sign the waiver form. The facts in question presented in *Connley* are almost identical to that presented in *Butler.* At the time of the preparation of this brief, there had been no ruling by this Court on that petition.

[13]In *State* v. *Silhan,* 295 N.C. 636, ____ S.E. 2d ____ (1978), the North Carolina Supreme Court's most recent application of a *Miranda* waiver, the Court excluded a confession wherein the suspect allegedly verbally waived his rights but indicated on the written waiver form that he *did* desire to have a lawyer present.

Blackmon case emphasizes that Court's interpretation of this aspect of federal law and how such interpretation is in conflict with the Federal Circuit Court of Appeals of this jurisdiction, and the Federal Circuit Courts of Appeal in all jurisdictions which have ruled upon this issue.

Defendant Johnny James Blackmon was convicted during the March 29, 1971 Term of the Superior Court of Stanly County, North Carolina for the offense of first degree murder. The jury making no recommendation for life imprisonment, the death penalty was imposed and defendant appealed. One of the errors assigned on appeal was admission into evidence of defendant's confession. The trial court on *voir dire* had found that the defendant at the time of his arrest was fully warned of his constitutional rights under *Miranda,* that defendant "did not request... the presence of an attorney," that he stated "he understood his rights," and that incriminating statements made thereafter were admissible. The North Carolina Supreme Court ruled it was error for the trial judge to allow into evidence such statement because there was no showing as required by federal law, as that Court interpreted *Miranda,* that the defendant had made a specific affirmative oral or written waiver of counsel, rendering the inclusion of

That ruling is consistent with this Court's decision in *Brewer* v. *Williams,* 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977). Since the suspect had indicated in some positive manner that he did not waive counsel, his subsequent confession was properly excluded.

such evidence prejudicial error. [*State* v. *Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971)] On retrial the defendant was again convicted during the 28 August 1972 session of Superior Court in Union County, North Carolina. The confession was again offered and received into evidence. The *voir dire* testimony showed that the incriminating statements which defendant made were made in an interrogation room in the presence of police officers when defendant was confronted by a co-defendant who accused the defendant of having shot the victim. The incriminating statements resulting from an exchange between these two suspects verbally confronting one another were admitted into evidence against Blackmon. When the co-defendant had left the room and the Sheriff asked defendant, "Do you care to make any further statement?", defendant responded, "Well, I'm just going to tell you how it was." His subsequent incriminating narrative was also admitted into evidence. On this second appeal the North Carolina Supreme Court in reviewing this same confession again said, "[t]hese facts, however, are not sufficient to constitute a waiver of counsel. *There is neither evidence nor findings of fact to show that defendant expressly waived his right to counsel, either in writing or orally, within the meaning of Miranda on which our decision in State* v. *Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971) *is based.*" [*State* v. *Blackmon*, 284 N.C. 1, 9, 199 S.E. 2d 431, 437 (1973) (Emphasis added)] However, the Court thereafter held the evidence admissible on the theory that such statements were not the result of an interrogation and were more in the nature of volunteered statements.

[*State* v. *Blackmon*, 284 N.C. at 12] The conviction was affirmed and case remanded for imposition of a life sentence. Blackmon thereafter proceeded by writ of habeas corpus to the Federal District Court for the Western District of North Carolina challenging his conviction through the use of such confession in violation of his federal constitutional rights. The District Court granted the writ, [*Blackmon* v. *Blackledge*, 396 F. Supp. 296 (W.D.N.C. 1975)], but the Circuit Court of Appeals reversed, finding under the facts as previously described that there had been a compliance with *Miranda* and that Blackmon had waived counsel, stating that after proper warnings, "... a suspect's submission to questioning without objection and without requesting a lawyer is clearly a waiver of his right to counsel..." [*Blackmon* v. *Blackledge*, 541 F. 2d 1070, 1073 (4th Cir. 1976)]

These opinions clearly focus the conflict in interpretation of federal law that exists in this jurisdiction.

ARGUMENT II

IN INTERPRETING AND APPLYING THE *MIRANDA DECISION*, LOWER FEDERAL COURTS HAVE APPLIED A TOTALITY OF CIRCUMSTANCES TEST IN DETERMINING IMPLIED WAIVER OF COUNSEL, REJECTING FURTHER EXTENSION AND EXPANSION OF *MIRANDA*.

A substantial body of case law has developed among the United States Circuit Courts of Appeal

rejecting any extension or expansion of *Miranda*. In *United States* v. *Ganter,* 436 F. 2d 364 (7th Cir. 1970) the court applied its interpretation of *Miranda* to a case wherein the suspect was arrested for assaulting an FBI agent and fleeing with the agent's gun. After being arrested and having been advised of his *Miranda* rights, the suspect was asked where the gun was located; he replied that the weapon was under a nearby couch, where it was in fact found. Citing *United States* v. *Montos,* 421 F. 2d 215, (5th Cir. 1970) *cert. den.* 397 U.S. 1022, 25 L. Ed. 2d 532, 90 S. Ct. 1262 (1970) as "an excellent summary of the *Miranda* doctrine as developed to date," the Seventh Circuit held "what we believe to be a salutary rule if police investigations are to have any efficacy whatsoever, namely, that an express statement that the individual does not want a lawyer is not required if it appears that the defendant was effectively advised of his rights and *he then intelligently and understandingly declined to exercise them." [Ganter,* 436 F. 2d at 370 (Emphasis added)]

In *Hughes* v. *Swenson,* 452 F. 2d 866 (8th Cir. 1971) the Eighth Circuit Court of Appeals was faced with the following issue. "The thrust of appellant's claim is that a valid waiver cannot be effective absent an expressed declaration to that effect. *We are cited to no case which supports appellant's thesis and independent research discloses none.* To the contrary, the Fifth, Seventh, Ninth, and Tenth Circuits have held in effect that if the defendant is effectively advised of his rights and intelligently and understandingly declines to exercise them, the waiver is valid." *[Hughes* v. *Swenson,*

452 F. 2d at 867 (emphasis added), citing as authority: *United States* v. *Montos,* 421 F. 2d 215, 224 (5th Cir.), *cert. den.* 397 U.S. 1022, 25 L. Ed. 2d 532, 90 S. Ct. 1262 (1970); *United States* v. *Ganter,* 436 F. 2d 364, 369-370 (7th Cir. 1970); *United States* v. *Hilliken,* 436 F. 2d 101, 102-103 (9th Cir. 1970), *cert. den* 401 U.S. 958, 28 L. Ed. 2d 242, 91 S. Ct. 987 (1971); *Bond* v. *United States,* 397 F.2d 162, 165 (10th Cir.) *cert. den.* 393 U.S. 1035, 21 L. Ed. 2d 579, 89 S. Ct. 652 (1968)]. Further research indicates that the United States Court of Appeals for the District of Columbia in *United States* v. *McNeil,* 433 F. 2d 1109 (1969) and *Mitchell* v. *United States,* 434 F. 2d 483 (D.C. Cir.), *cert. den.* 400 U.S. 867 (1970), had taken a similar position at the time of the *Hughes* v. *Swenson* decision in the Eighth Circuit. The Third and Fourth Circuit Courts of Appeal had taken this same position at the time of the *Hughes* v. *Swenson* decision in *United States* v. *Ruth,* 394 F. 2d 134 (3rd Cir.), *cert. den.,* 393 U.S. 888 (1968), *United States* v. *Stuckey,* 441 F. 2d 1104 (3rd Cir.), *cert. den.,* 404 U.S. 841 (1971) and *United States* v. *Thompson,* 417 F. 2d 196 (4th Cir.) *cert. den.,*396 U.S. 1047 (1970).

Thereafter a number of the remaining Circuit Courts of Appeal followed suit. In *United States* v. *Moreno-Lopez,* 466 F. 2d 1205 (9th Cir. 1972) the Ninth Circuit remained consistent with its prior *Miranda* interpretation finding that "[a]n express waiver is not required. Rather, courts must look at the circumstances of each case to determine the validity of a waiver of *Miranda* rights." In *United States* v. *Speaks,* 453 F. 2d 966 (1st Cir. 1972) the First Circuit Court of Appeals

found a valid waiver where the properly warned suspect refused to sign the written waiver, but was willing to talk. In *United States* v. *Boston,* 508 F. 2d 1171 (2nd Cir. 1974) the Second Circuit Court of Appeals refused to adopt a *per se* exclusionary rule where there was no written waiver and the suspect refused to sign a waiver, looking instead to the surrounding circumstances in determining that there was a valid waiver of rights. Citing a number of the aforementioned cases, The Eighth Circuit Court of Appeals took a similar position in *United States* v. *Marchildon,* 519 F. 2d 337 (8th Cir. 1975), consistent with its decision in *Hughes* v. *Swenson.* In *Blackmon* v. *Blackledge, supra,* the Fourth Circuit Court of Appeals citing the above authorities found a suspect's waiver by implication "in all of the surrounding circumstances, including his knowledge of his rights and his response to questioning without objection or expression of a wish for the presence of a lawyer." The Court went on to find that the suspect "never requested a lawyer or suggested in any way that he did not wish to submit to questioning without the presence of a lawyer. Waiver is implicit in such circumstances, for it is quite inconsistent with an assertion of the known right." *[Blackmon,* 541 F. 2d at 1073]

Present research indicates that the Sixth Circuit Court of Appeals is the only Federal Circuit Court which has not yet faced and resolved this issue. All remaining Circuit Courts of Appeal appear to have adopted a *totality of the circumstances test* in determining whether there exists an implied waiver,

where an express waiver is absent. Such has been and continues to be a proper interpretation and application of the *Miranda* decision, precluding any unwarranted expansion or extensions.[14]

---

[14] An examination of the opinions of the Supreme Courts and Courts of Appeal of the various States reveals that a number of states have interpreted *Miranda* as allowing an implied waiver of counsel from the totality of the circumstances. The following twenty states appear to recognize *implied waiver:*

ALABAMA—*Sullivan* v. *State,* Ala.Cr.App. 351 So.2d 659, cert. denied 351 So.2d 665 (1977).

ARIZONA—*State* v. *Pineda,* 110 Ariz. 342, 519 P.2d 41 (1974); *State ex rel Berger* v. *Superior Court,* 109 Ariz. 506, 513 P.2d 935 (1973).

CALIFORNIA—*People* v. *Johnson,* 75 Cal.Rptr. 401, 450 P.2d 865 (reversed on other grounds) (1969); *People* v. *Sam,* 77 Cal.Rptr. 804, 454 P.2d 700 (1969).

COLORADO—*People* v. *Weaver,* 179 Colo. 331, 500 P.2d 980 (1972); *Reed* v. *People,* 171 Colo. 421, 467 P.2d 809 (1970).

DELAWARE—*Aaron* v. *State,* Del.Supr. 275 A.2d 791 (1971).

FLORIDA—*State* v. *Craig,* Fla. 237 So.2d 737 (1970).

GEORGIA—*Peek* v. *State,* 239 Ga. 422, 238 S.E.2d 12 (1977).

ILLINOIS—*People* v. *Brooks,* 51 Ill.2d 156, 281 N.E.2d 326 (1972).

KANSAS—*State* v. *Baker,* Kan.App. 580 P.2d 90 (1978).

MAINE—*State* v. *Hazelton,* Me. 330 A.2d 919 (1975).

MARYLAND—*Miller* v. *State,* 251 Md. 362, 247 A.2d 530 (1968); *Burton* v. *State,* 7 Md.App. 671, 256 A.2d 826 (1969).

MASSACHUSETTS—*Commonwealth* v. *Johnson,* Mass.App. 326 N.E.2d 355 (1975); *Commonwealth* v. *Murray,* 359 Mass. 541, 269 N.E.2d 641 (1971).

ARGUMENT III

CERTAIN PORTIONS OF THE *MIRANDA DECISION LEAD TO THE INTERPRETATION AND CONCLUSION OF THE FEDERAL* CIRCUIT COURTS OF APPEAL AND THE OTHER COURTS CITED ABOVE THAT A PROPERLY WARNED CRIMINAL SUSPECT DOES NOT EXERCISE HIS RIGHT TO SILENCE UNDER *MIRANDA* UNLESS HE STANDS MUTE OR OTHERWISE CLEARLY EXPRESSES HIS DESIRE NOT TO SPEAK, AND THAT ANY OTHER CONDUCT MAY IMPLY A WAIVER OF RIGHTS TO SILENCE AND COUNSEL.

MINNESOTA—*State* v. *Nelson*, ___ Minn. ___, 257 N.W.2d 356 (1977).

MISSOURI—*State* v. *Williams*, Mo.Cr.App. 547 S.W.2d 139 (1977); *State* v. *Alewine*, Mo. 474 S.W.2d 848 (1972); *State* v. *Burnside*, Mo. 473 S.W.2d 697 (1971).

OKLAHOMA—*Shirley* v. *State*, Okl.Cr. 520 P.2d 701 (1974).

OREGON—*State* v. *Davidson*, 252 Ore. 617, 451 P.2d 481 (1969).

PENNSYLVANIA—*Commonwealth* v. *Cost*, 238 Pa.Superior Ct. 591, 362 A.2d 1027 (1976); *Commonwealth* v. *Garnett*, 458 Pa. 4, 326 A.2d 335 (1974).

TENNESSEE—*Parks* v. *State*, Tenn.Cr.App. 543 S.W.2d 855 (1976); *Bowling* v. *State*, Tenn.Cr.App. 458 S.W.2d 639 (1970).

VIRGINIA—*Land* v. *Commonwealth*, 211 Va. 223, 176 S.E.2d 586 (1970) (reversed on other grounds).

WASHINGTON—*State* v. *Young*, 89 Wash.2d 613, 574 P.2d 1171 (1978).

Miranda imposes a constitutional duty and burden upon a police officer conducting custodial interrogation to properly inform the suspect of his rights and to honor any right which the suspect chooses to exercise. Although a police officer may not in any manner improperly discourage the exercise of basic constitutional rights by a suspect, such officer is not required or obliged to encourage a suspect to exercise these rights, nor is he expected to exercise a particular right for the suspect. Expecting such of law enforcement personnel would require an abrogation of their function.[15] Although the officer bears *Miranda's*

---

[15] • • • "[I]n this country we have one of the most moralistic criminal law systems that the world has yet produced. It is enforceable only in a sporadic, uneven and discriminatory fashion. The most severe drug laws and the largest number of addicts. Highly restrictive sex laws in a society that can hardly be regarded as dedicated either to monogamy or the missionary position in copulation; and in which sexual stimuli are ubiquitous. In relation to these laws the police have ritual, sacerdotal functions to perform, like a secular priesthood. And they have also to handle our drunks and alcoholics, our snarled and feverish traffic, our vagrants, our treed cats, our parading dignitaries, our gamblers other than us, our burgeoning riots, and in the remainder of their time to protect us from serious crime.

• • • In many of our cities we pay the police less than the garbage collector, overload them with a morally pretentious law, and require them to demonstrate wisdom and skill in excess of that which is expected of any of the established professions. The

burden to *inform* the suspect of his rights, the suspect bears the responsibility in the *exercise* of these rights. The officer may not improperly influence the suspect's decision, but it is the suspect who must by word or act make and demonstrate his choice.

This Court's language in *Miranda* addresses that distinction: "Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner* at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." [384 U.S. at 473-474 (Emphasis added)]

A RATIONAL INTERPRETATION OF THIS LANGUAGE WOULD INDICATE THAT ONCE WARNINGS HAVE BEEN PROPERLY GIVEN AND ACKNOWLEDGED IN THE ABSENCE OF ANY INDICATION THAT THE SUSPECT WISHES TO REMAIN SILENT OR TO CONSULT WITH COUNSEL, THE OFFICER MAY PROPERLY BEGIN TO QUESTION THE SUSPECT UNTIL THE SUSPECT EXERCISES ONE OF THESE RIGHTS OR "INDICATES IN ANY MANNER" THAT HE CHOOSES TO DO SO.

---

policeman is expected to be an expert on the law, a psychologist, a strategist, on occasion a midwife, a protector of public safety, a ruthless prosecutor of crime and at the same time a guardian of civil liberty."

L. Hall, Y. Kamisar, W. LaFave, J. Israel, MODERN CRIMINAL PROCEDURE (3rd Edition, 1969) p. 160.

If the suspect chooses to exercise his right to silence, this Court, as indicated in *Doyle* v. *Ohio,* 426 U.S. 610, 49L. Ed. 2d 91, 96 S. Ct. 2240 (1976), will rigidly protect that choice and will allow no inference of guilt to be drawn from the suspect's decision not to speak.

If the suspect chooses to exercise his right to counsel, this Court, as indicated in *Brewer* v. *Williams,* 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977) will require strict adherence to such request and will prohibit any attempt at circumvention.

However, if the properly warned suspect makes the decision to speak, he by his words or actions demonstrates what rights, if any, he chooses to *exercise.* In *United States* v. *Washington,* 431 U.S. 181, 52 L. Ed. 2d 238, 97 S. Ct. 1814 (1977) this Court, in refusing to hold inadmissible at a federal criminal prosecution the grand jury transcripts of incriminating testimony of a defendant who had chosen to testify before such federal grand jury after proper admonishments regarding his Fifth Amendment rights, indicated that incriminating statements made voluntarily by a properly warned suspect who chose to speak and thus chose not to exercise his right to silence was competent evidence irrespective of whether or not the suspect fully appreciated that the focus of the investigation had crystallized upon him and that any statement he made had potential adverse significance.

The language of *Miranda* is not inconsistent with the concept of implied waiver, nor does the *Miranda* Court's choice of language preclude implied waiver as a viable concept in the application of its decision.

A decision expressly to exercise the right to remain silent or to consult counsel or a decision to expressly waive both rights is not the only alternative presented in the usual custodial interrogation situation. The totality of the circumstances may in some cases reflect an implied exercise of rights, as when the accused simply remains silent. Likewise the totality of the circumstances may reflect an implied waiver as when the accused promptly volunteers an incriminating statement. *The test is not whether the exercise of the waiver is express, but whether it is real, recognizing that the burden of persuasion in establishing waiver rests entirely with the State.*

ARGUMENT IV

THE POLICY CONSIDERATIONS UNDERLYING *MIRANDA* AS DISCUSSED BY THIS COURT IN THAT DECISION AND IN ITS SUBSEQUENT DECISIONS SUPPORT A RULE OF LAW WHICH ALLOWS A FINDING OF IMPLIED WAIVER OF COUNSEL FROM THE TOTALITY OF THE CIRCUMSTANCES, BALANCING THE INTERESTS OF SOCIETY AND OF THE SUSPECT.

The landmark *Miranda* decision enunciated a series of specific protective procedural guidelines necessary to secure and insure a criminal suspect's Fifth Amendment privilege against compulsory self-incrimination during custodial interrogation. The historical roots of the Fifth Amendment privilege

against compulsory self-incrimination lay in the Founding Fathers' desire to prohibit *Star Chamber* proceedings and assorted inquisition style brutalities by law enforcement officers who sought to obtain admissions of guilt from a suspect's own lips. This Court indicated that these procedural safeguards were not themselves rights protected by the Constitution, but were prophylactic measures to ensure that a criminal suspect's right against compulsory self-incrimination during a custodial interrogation was protected. Under *Miranda,* the suspect must be apprised of his Fifth Amendment rights and make a voluntary, knowing, and intelligent waiver before his statements can be introduced by the prosecution against him in its case in chief. The Court stated, "The warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent,* prerequisites to the admissibility of any statement made by a defendant." [384 U.S. at 476] In analyzing whether a waiver of an individual's *Miranda* rights can be implied from the totality of the circumstances immediately preceding the giving of a statement, the policy considerations underlying *Miranda,* as enunciated by the Court in cases following *Miranda,* must be examined.

In *Michigan* v. *Tucker,* 417 U.S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974), this Court set forth a two-pronged analysis of *Miranda* rights questions. Mr. Justice Rehnquist, delivering the opinion of the Court, reviewed the historical antecedents of the Fifth Amendment privilege against compulsory self-incrimination. He indicated that the *Miranda* prophylactic guidelines were not intended to create a constitutional straight-jacket to thwart police, but

instead were intended to provide practical reinforcement for the right against self-incrimination. The Court drew a distinction between the violation of the actual privilege itself, [i.e., the right to be free of torture, isolation, starvation, or assorted mental or physical pressure overbearing the suspect's will and thereby compelling incriminating statements] and the violation of a prophylactic safeguard created to preserve this privilege. If the underlying privilege is violated, a suspect's statements are *per se* inadmissible for any purpose. [See *Mincey* v. *Arizona*, ____ U.S. ____, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978)] However, if merely the prophylactic guidelines are violated, then the Court will balance the interests of the suspect's constitutional Fifth Amendment right against the government's interests in protecting society from criminals. In assessing the government's interests, the Court will weigh the deterrent value of excluding the evidence in question to deter future unlawful police conduct against the strong interest of making available to the trier of fact all concededly relevant and trustworthy evidence. Mr. Justice Rehnquist indicated that the exclusionary rule concerning technical violations of *Miranda's* prophylactic guidelines only makes sense if it will deter police conduct which is willful or negligent or if the statements obtained are untrustworthy. The real significance of *Michigan* v. *Tucker* lies in the Court's rejection of a purely mechanical application of *Miranda's* exclusionary provisions for violation of the prophylactic guidelines enunciated in *Miranda* and in its willingness to look at the circumstances of the case in order to balance the interests of society and the criminal suspect. In *Michigan* v. *Tucker*, the Court struck the balance in favor of the government.

Michigan v. *Tucker* was decided shortly after *Harris* v. *New York*, 401 U.S. 222, 28, L. Ed. 2d 1, 91 S. Ct. 643 (1971), wherein the Court indicated that it would not expand *Miranda* beyond its specific holding. In *Harris*, the Court decided that although a criminal suspect has the right to be free from having statements which were elicited from him in violation of *Miranda* used against him by the prosecution in its case in chief [deterrent interest], a criminal defendant could not use the shield provided by *Miranda* as a license to commit perjury if the criminal defendant took the stand to testify falsely in his own defense [interest in preserving judicial integrity and making relevant and trustworthy evidence available to the trier of fact]. Therefore, the Court struck the balance in favor of allowing the prosecution to use otherwise impermissible statements [which were only technical *Miranda* violations] to impeach such a criminal defendant's testimony.

In *Michigan* v. *Mosley*, 423 U.S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 321 (1975), the Court's decision turned on the interpretation of a single paragraph from the *Miranda* decision. Rejecting literal interpretations of the *Miranda* language that would lead to absurd and unintended results, the Court addressed *Miranda's* purpose of protecting criminal suspects' Fifth Amendment rights as balanced against the probability that a literal interpretation of *Miranda* would "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." [423 U.S. at 102] The Court once again balanced the interests of a criminal suspect's right to be free from compulsory self-incrimination against the interests of the State to

relevant and trustworthy evidence, holding that the criminal suspect's Fifth Amendment rights, upon re-questioning following an initial assertion of his right to silence, were not violated as long as he was not deprived of his right to cut off all present and future questioning by the police should he choose to do so.

The trend of the United States Supreme Court cases concerning interpretations of *Miranda* was clearly articulated by Mr. Justice Rehnquist, as Circuit Justice, in his order granting an application for a stay of enforcement of a California Supreme Court Judgment in *Fare* v. *Michael C.*, ____ U.S. ____, 58 L. Ed. 2d 19, 99 S. Ct. 3 (1978), as he commented that, "... this Court has been consistently reluctant to extend *Miranda* or to extend in any way its strictures on law enforcement agencies." [99 S.Ct. at 5] The Court simply will not create any extensions of *Miranda* which would "cut *Miranda* loose from its doctrinal moorings." [Id., at 5]

Keeping in mind the balance of interests surrounding the applicability of any extensions of *Miranda*, the underlying policy which serves as its doctrinal moorings bears examination. The *Miranda* Court stated that the constitutional foundation underlying the privilege against compulsory self-incrimination is the respect a government must accord to the dignity and integrity of its citizens. [384 U.S. at 460] The Court primarily focused on the right of the individual to be free from coercive tactics which overbear his will and compel him to incriminate himself. The analysis involves considerations of a

complex of values implicated in police questioning of a suspect in a custodial atmosphere. At one end of the continuum is the need for police questioning as a tool for the effective enforcement of criminal laws. At the other end is the societal belief that criminal law enforcement cannot be used as an instrument of coercion and unfairness. There is a fundamental tension between society's interest to be secure [effective law enforcement, judicial integrity, search for the truth, and punishment of criminals], and the individual's interest to be free from governmental intrusion which improperly overbears, coerces, and restrains liberty. The *Miranda* case attempted to strike the balance between security and liberty by creating rigid and precise prophylactic rules. To enforce this balance, an exclusionary rule was adopted. The rationale for the exclusionary rule was to deter police misconduct and protection of the courts from untrustworthy evidence. As Mr. Justice Rehnquist stated in *Michigan* v. *Tucker*, the pressures of law enforcement and the vagaries of human nature make it unrealistic to require policemen investigating serious crimes to make no errors whatsoever. Where the policeman's actions were pursued in complete good faith and he has not engaged in willful or negligent conduct, the deterrent rationale loses much of its force. In addition, if only technical violations of *Miranda* are involved, then there is little likelihood that the statements are untrustworthy. Considering society's interest in being secure from criminals, judicial integrity, and the fundamental fairness of punishing those guilty of serious crimes, the balance should shift in favor of not finding constitutional

infirmity when mere technical infractions of *Miranda* are involved. Furthermore, as the Court indicated in *Michigan* v. *Mosley*, the Court will look to *Miranda's* underlying purposes and will not allow literal interpretations of passages in *Miranda* to lead to absurd and unintended results which could transform *Miranda* safeguards into wholly irrational obstacles to legitimate police activity. [423 U.S. at 102]

When considering the question of waiver of *Miranda* rights, a similar balancing of interests must be kept in mind. This Court has never held that a waiver of an individual's *Miranda* rights cannot be implied from the totality of the circumstances surrounding the giving of his statement. The suspect can easily protect his interest in preserving his Fifth Amendment rights by remaining silent or by telling the police officer that he does not desire to speak and/or by requesting to speak to an attorney prior to answering questions. On the other hand, no deterrent effect will be accomplished by excluding statements made voluntarily to police officers who take such statements after reasonably determining that the suspect has waived his rights under *Miranda* based upon the totality of the circumstances. To disallow the finding of an implied waiver under such circumstances would transform the procedural safeguards of *Miranda* into an irrational obstacle to legitimate police activity. Surely this is not what *Miranda* intended. An implied waiver is a fully effective equivalent of an express waiver as long as the facts warrant the conclusion that there was an implied waiver. This comports with society's interest in security

and judicial integrity. Furthermore, it allows the trier of fact to receive relevant trustworthy evidence and satisfies the societal interest that perpetrators of crime be punished. Balancing these interests leads to the conclusion that this Court should hold that a waiver of a criminal suspect's *Miranda* rights can be implied from the totality of circumstances.

ARGUMENT V

IN SUBSEQUENT DECISIONS THIS COURT "HAS BEEN CONSISTENTLY RELUCTANT TO EXTEND *MIRANDA* OR TO EXTEND IN ANY WAY ITS STRICTURES ON LAW ENFORCEMENT AGENCIES."[16]

As noted by Mr. Justice Rehnquist in his *IN-CHAMBERS OPINION* staying enforcement of a judgment of the California Supreme Court adverse to the state which required exclusion of a juvenile's confession in *Fare* v. *Michael C.*, 21 Cal. 3rd 471 (1978), "some pattern has developed in the handling of *Miranda* issues. . . ."

The Justice goes on to say:

> "*Miranda* v. *Arizona* was decided by a closely divided Court in 1966. While the rigidity of the prophylactic rules was a principal weakness in the view of dissenters

---

[16] *Fare* v. *Michael C.*, ___ U.S. ___, ___, 58 L. Ed. 2d 19, 23, 99 S. Ct. 3, 5, (1978).

and critics outside the Court, its supporters saw that rigidity as the strength of the decision. It afforded police and courts clear guidance on the manner in which to conduct a custodial investigation: if it was rigid, it was also precise. But this core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely augmented by other courts under the guise of 'interpreting' *Miranda*, particularly if their decisions evinced no principled limitations. Sensitive to this tension, and to the substantial burden which the original *Miranda* rules have placed on local law enforcement efforts, this Court has been consistently reluctant to extend *Miranda* or to extend in any way its strictures on law enforcement agencies."

[*Fare* v. *Michael C.*, ___ U.S. ___, 58 L. Ed. 2d 19, 23, 99 S. Ct. 3, 5 (1978)]

Mr. Justice Rehnquist, in expressing concern that unrestrained lower court interpretation of *Miranda* "risks cutting *Miranda* loose from its doctrinal moorings," concludes that in the United States Supreme Court's subsequent cases "the overall thrust of these cases represents an effort to contain *Miranda* to the express terms and logic of the original opinion."[17]

---

[17] *Fare* v. *Michael C.*, *Supra*, 58 L. Ed. 2d 19, 24, 99 S. Ct. 3, 5 (1978).

In *Harris* v. *New York*, 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971) the Court refused to *extend Miranda* to require a *per se* exclusion of a confession, taken without proper *Miranda* warnings but which was otherwise voluntary, used in cross examination to impeach the defendant's direct testimony. When the Oregon Supreme Court thereafter refused to accept the fine line of *Harris* and chose to extend *Miranda* violations as a total *per se* exclusion for any purpose in their jurisdiction beyond the perimeters of *Harris* and of this Court's desired intent, the Court reversed in *Oregon* v. *Hass*, 420 U.S. 714, 43 L. Ed 2d 570, 95 S. Ct. 1215 (1975), making it clear that the United States Supreme Court will allow no further extension or expansion of *Miranda* beyond that which it deems appropriate. However, in *Mincey* v. *Arizona*, 437 U.S. ___, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978) this Court made it clear that the *Harris* exception to *per se* exclusion arises only when a *"Miranda violated"* confession is otherwise voluntary.

In its *per curiam* opinion of *Oregon* v. *Mathiason*, 429 U.S. 492, 50 L. Ed. 2d 714, 97 S. Ct. 711 (1977) this Court declined the opportunity to extend the scope of *Miranda* to expand the concept of "custodial interrogation" broad enough to include a burglary suspect on parole who voluntarily came down to the police station at police request for questioning, who was not under arrest, and who was free to leave at any time and did in fact leave after making incriminating statements without the benefit of *Miranda* warnings. Reversing the Oregon Supreme Court's suppression of

such confession, the Court said: "We think that court has read *Miranda* too broadly, and we therefore reverse its judgment." This Court found that this interrogation was not "that sort of coercive environment to which *Miranda* by its terms was made applicable and to which it is limited."

In *Michigan* v. *Mosley*, 423 U.S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 321 (1975) this Court refused to hold that, once rights are invoked, *Miranda* creates a *per se* proscription of indefinite duration precluding any subsequent opportunity to obtain a valid waiver and a voluntary statement.

In *Beckwith* v. *United States*, 425 U.S. 341, 48 L. Ed. 2d 1, 96 S. Ct. 1612 (1976) this Court did not see fit to extend *Miranda* warning requirements to IRS Agents questioning tax evasion suspects regarding federal income tax liability, even though the focus of any criminal investigation was directed entirely at the suspect being interrogated.

These decisions strongly echo the words of Justice Rehnquist that "the overall thrust of these cases represents an effort to contain *Miranda* to the express terms and logic of the original opinion."

CONCLUSION

Upon the reasoning and authorities heretofore cited and discussed, the State of North Carolina respectfully submits that the Supreme Court of North Carolina erred in its interpretation of *Miranda* v. *Arizona* that the showing of a specific express oral or

written waiver of counsel is a mandatory prerequisite to the admissibility of any statement made by a suspect during in-custody interrogation, where such literate, adult suspect has been properly advised of his *Miranda* rights prior to questioning, has acknowledged that he understands such rights, has indicated he would "talk to you but I am not signing any form", has not been subjected to improper and unfair police activity or coercion, and has spoken freely and voluntarily in response to questions without requesting counsel or indicating in any manner that he wished to remain silent. Therefore, the decision of the North Carolina Supreme Court suppressing the respondent's confession on such basis, and the Court's order for a new trial, should be reversed and the conviction of this respondent should be affirmed. Respondent's conviction is free from any constitutional infirmity requiring a new trial.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

LESTER V. CHALMERS, JR.
Special Deputy Attorney General

DONALD W. STEPHENS
Assistant Attorney General

Counsel for Petitioner
STATE OF NORTH CAROLINA

North Carolina Department
of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-2011

CERTIFICATE OF SERVICE

I hereby certify that I am Assistant Attorney General for the State of North Carolina; that I have served copies of the within BRIEF FOR THE PETITIONER by depositing copies of same in the United States mail at Washington, D.C., first class postage paid, addressed to:

Mr. R. Gene Braswell
Attorney at Law
231 E. Walnut Street
Goldsboro, North Carolina 27530

Mr. Michael A. Ellis
Attorney at Law
615 Park Avenue
Goldsboro, North Carolina 27530

This 25th day of January, 1979

/s/ _____
DONALD W. STEPHENS
Assistant Attorney General

COUNSEL FOR THE
STATE OF NORTH CAROLINA,
Petitioner

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-354

STATE OF NORTH CAROLINA,
Petitioner,

v.

WILLIE THOMAS BUTLER,
Respondent.

On Writ Of Certiorari To The Supreme Court of North Carolina

BRIEF FOR THE RESPONDENT

R. GENE BRASWELL
P.O. Box 1582
Goldsboro, North Carolina 27530

Counsel for the Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONSTITUTIONAL PROVISION INVOLVED 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. This Court and Lower Federal Courts Have Consistently Held That the Waiver of a Known Right, Such as an Accused's Right to Counsel Will Not Be Lightly Presumed 3

II. The Miranda Decision Itself Holds That the Rejection of the Offer of Counsel or the Waiver of Counsel Must Be Specifically Made 4

III. A Requirement of an Express Declaration of the Right to Counsel Before Questioning Will Insure the Even and Equal Application of the Fifth Amendment Privilege 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES:

Brewer v. *Williams*, 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977) 5

Carnley v. *Cochran*, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962) 3

Ford v. *Wainwright*, 526 F.2d 919 (1976) 3

Johnson v. *Zerbst* 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938) 2, 3

McNeil v. *Culver*, 365 U.S. 109, 81 S. Ct. 413, 5 L. Ed. 2d 445 (1961)..... 3

Miranda v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 4, 6

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment V 1

United States Constitution, Amendment XIV, Section 1..... 1

IN THE

Supreme Court of the United States

OCOTBER TERM, 1978

No. 78-354

STATE OF NORTH CAROLINA,
Petitioner,

v.

WILLIE THOMAS BUTLER,
Respondent.

BRIEF FOR THE RESPONDENT

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides:

> "No person . . . shall be compeled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

Amendment XIV, Section 1 of the Constitution of the United States provides:

> ". . . (n) or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

QUESTION PRESENTED

SHOULD AN EXPRESS DECLINATION OF THE RIGHT TO COUNSEL BE REQUIRED FROM A SUSPECT PRIOR TO ANY QUESTIONING BY LAW ENFORCEMENT OFFICIALS?

STATEMENT OF THE CASE

The respondent will rely on the Statement of the Case as set forth in the Petitioner's Brief with one exception. Willie Thomas Butler was never asked "Do you want a lawyer?".

SUMMARY OF ARGUMENT

This Court has consistently held that it will indulge every reasonable presumption against a waiver of fundamental constitutional rights and does not presume acquiescence in their loss. *Johnson* v. *Zerbst*, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). Requiring an express declination of the right to counsel prior to questioning is a concrete guideline that will preserve this Court's principle of indulging every reasonable presumption against waiver of fundamental constitutional rights and will at the same time best insure the even application of the Fifth Amendment privilege. The respondent contends that this express declination of the right to counsel is a sure way to determine whether all types of suspects, both educated and uneducated have knowingly, intelligently and understandingly declined to exercise their right to counsel and presents no obstacle to effective law enforcement

in that law enforcement officals would only be required to ask "Do you want a lawyer?" after the reading of the advice of rights form.

ARGUMENT

I. This Court And Lower Federal Courts Have Consistently Held That The Waiver Of A Known Right, Such As An Accused's Right To Counsel Will Not Be Lightly Presumed.

A substantial body of case law has developed indicating that Courts will indulge every reasonable presumption against waiver of fundamental constitutional rights such as the right to counsel. *Johnson* v. *Zerbst*, supra; *Carnley* v. *Cochran*, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962); *Ford* v. *Wainwright*, 526 F., 2d 919 (1976). This court in *Carnley* v. *Cochran*, supra, in applying this principle, stated that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request for the assistance of counsel and that presuming waiver of counsel from a silent record is impermissable. In that case, the record did not show that the trial judge offered and that the accused declined counsel just as the record in this case which does not show that Willie Thomas Butler declined counsel after he was informed of his rights after his reading of the advice of rights form. The record in this case does show that Willie Thomas Butler did not make a request for assistance of counsel, but the failure to request assistance of counsel is not a waiver. *Carnley* v. *Cochran*, supra; *McNeil* v. *Culver*, 365

U.S. 109, 81 S. Ct. 413, 5 L. Ed. 2d 445 (1961). The respondent acknowledges that the cases cited above concern the assistance of counsel in situations other than custodial interrogation but contend that they would be pertinent in view of a suspect's right to be assisted by counsel at a custodial police interrogation.

II. The Miranda Decision Itself Holds That The Rejection Of The Offer Of Counsel Or The Waiver Of Counsel Must Be Specifically Made.

In *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United Supreme Court said:

> "An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless *specifically* made after the warnings we here delineate have been given . . . (Emphasis added.)
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. . . ."

The Miranda decision seems to be a culmination of the principles covered in Argument I in that the decision stated that the standard for waiver of counsel is necessarily high, that a valid waiver would not be presumed from the silence of the suspect after the warnings are given nor from the fact that the suspect eventually talked and that a suspect's failure to ask for a lawyer does not constitute a waiver. Willie Thomas Butler never rejected counsel in the manner prescribed by this decision and his waiver should not be allowed to be inferred from the facts that he eventually talked and that he did not make a pre-interrogation request for a lawyer.

The respondent acknowledges that since the Miranda decision that various Circuit Courts have ruled that an express statement that a suspect did not want a lawyer was not required. However, of all the United States Supreme Court cases cited by the Petiioner in his brief, the case of *Brewer* v. *Williams*, 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977), seems to present the closest factual situation to this case. The Brewer case concerned incriminating evidence made by a prisoner to police officers as he was being transported from one town to another. He was booked on the charge of abduction in one town and was being transported to another town. The prisoner was advised of his Miranda rights at the arraignment and was advised by a lawyer not to make any statements until he saw his attorney in the other town. When the officers from the other town arrived, one of them repeated the Miranda warnings and during the trip, the prisoner did not express a willingness to be interrogated in the absence of his attorney but stated that

he would tell the whole story after seeing his attorney. One of the officers told the prisoner during the trip that they should stop and locate the body. Subsequently the prisoner made several incriminating statements and directed the officers to the body. The prisoner was convicted of first degree murder and the conviction was affirmed by the Iowa Supreme Court. His petition in Federal District Court for a Writ of Habeas Corpus was granted on the grounds that the evidence in question had been wrongfully admitted at trial and the United States Court of Appeals for the Eighth Circuit affirmed. On Certiorari, the United States Supreme Court affirmed and ruled among other things that there were no reasonable basis for finding that the prisoner had waived the right to the presence of counsel. The Brewer case is similar in that Willie Thomas Butler was advised of his rights and said that he would talk to the officers. Even though in the Brewer case, the prisoner already had an attorney and asserted that he had an attorney, the same principles would be involved since the assistance of counsel could be waived after it had attached.

III. A Requirement Of An Express Declination Of The Right To Counsel Before Questioning Will Insure The Even And Equal Application Of The Fifth Amendment Privilege.

"The privilege against self-incrimination is as broad as the mischief against which it seeks to guard." *Miranda* v. *Arizona*, supra. This mischief, of course, would be police misconduct, which would be encour-

aged with no concrete constitutional guideline as to what is an effective waiver. Armed with a ruling that states that a suspect does not have to expressly decline his right to counsel prior to questioning, law enforcement officials could cleverly create implied waivers of counsel and therefore thwart the main issue as to whether or not the suspect really in fact wants his counsel to be present. The most positive and simple test to determine if all suspects, both illiterate and literate, have knowingly, intelligently and understandingly declined to exercise their constitutional right to counsel is to require law enforcement officials to ask to the suspects specifically if he wants a lawyer after the rights are read to him and then seek an affirmative or negative answer. The petitioner has stated in his brief that the test is not whether the exercise of the waiver is express but whether it is real, but the respondent contends that the most positive method to determine if it is real is to require an express response to, "Do you want a lawyer?". This requirement of an express declination after the asking of this one question would certainly not be a burden to law enforcement officials and would not lead to an absurd result since it would only tell right from the start whether the suspect actually in fact wanted counsel present. A ruling in favor of express declination would provide clear guidelines for law enforcement officials and produce the most positive method to ascertaining in fact whether a suspect wishes to waive his right to the presence of counsel.

CONCLUSION

The right to counsel during custodial interrogation is a very precious and fundamental right and the conditions under which that right may be waived should be stringent with clear guidelines for law enforcement officials to determine if the right has been waived. The respondent contends that this court should again indulge a presumption against waiver and protect the underlying privilege against self-incrimination itself. A requirement for express declination of this fundamental right will insure the even application of the Fifth Amendment privilege and will provide the most error free test for determining if this right has been knowingly, intelligently and understandingly waived. The respondent therefore urges this court to affirm the judgment of the Supreme Court of North Carolina.

Respectfully submitted,

R. GENE BRASWELL,
P.O. Box 1582
Goldsboro, North Carolina 27530
Telephone: (919) 735-6420

Counsel for Respondent

IN THE

Supreme Court of the United States

October Term, 1978

NO. 78-354

STATE OF NORTH CAROLINA,
Petitioner,

v.

WILLIE THOMAS BUTLER,
Respondent,

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE A BRIEF, AMICI CURIAE, AND BRIEF AMICI CURIAE, IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., NORTH CAROLINA ASSOCIATION OF CHIEFS OF POLICE INC., NORTH CAROLINA DISTRICT ATTORNEYS ASSOCIATION, INC., NORTH CAROLINA POLICE EXECUTIVES ASSOCIATION, INC., NORTH CAROLINA ASSOCIATION OF POLICE ATTORNEYS, INC., NORTH CAROLINA SHERIFFS ASSOCIATION, INC.

of counsel:
KURT C. STAKEMAN
Raleigh Police Dept.
Box 590
Raleigh, N.C. 26702

FRANK CARRINGTON, ESQ.
Wayne W. Schmidt, Esq.
Fred E. Inbau, Esq.
Americans For Effective Law Enforcement, Inc.
960 State National Bank Plaza
Evanston, Illinois 60201
(312) 866-8400

TABLE OF CONTENTS

PAGE

Table of Authorities i
Motion for Leave to File a Brief, Amici Curiae, in support of Petitioner 1
Interest of the Amici Curiae 2
Brief, Amici Curiae in Support of the Petitioner 5
Argument 5

I. THIS COURT SHOULD ADOPT A "TOTALITY OF CIRCUMSTANCES" TEST IN DETERMINING WAIVER OF RIGHT TO COUNSEL 6

A. THE INFLEXIBLE, PER SE RULES ENUNCIATED IN MIRANDA V. ARIZONA HAVE RESULTED IN LOWER COURT INTERPRETATIONS WHICH SUPPRESS OTHERWISE VOLUNTARY CONFESSIONS, AND HENCE THE TRUTH, IN THE CRIMINAL JUSTICE PROCESS 7

B. THIS CASE PRESENTS A CLASSIC EXAMPLE OF ALL OF THE REASONS WHY THE RIGIDITY OF MIRANDA SHOULD BE MADE MORE FLEXIBLE. 9

II. INTERROGATION OF CRIMINAL SUSPECTS IS ESSENTIAL TO EFFECTIVE LAW ENFORCEMENT AND SHOULD NOT BE FRUSTRATED BY OVER-RIGID, PROPHYLACTIC RULES 15

Conclusion 18

TABLE OF AUTHORITIES

Berger v. New York,
388 U.S. 41 (1967) 17
Biggerstaff v. State,
491 P. 2d 345 (Okla. App. 1971) 8
Commonwealth v. Singleton,
439 Pa. 185, 266 A.2d 753 (1970) 8
DuPont v. United States,
259 A.2d 355 (D.C. App. 1969) 8
Fare v. Michael C.,
No. 78, 332, October Term, 1978, U.S. Supreme Court, ____ U.S. ____,
99 S. Ct. 3 (1978) 7,8,9,17
Harris v. New York,
401 U.S. 22 (1971) 8
In Re Michael C.,
21 Cal.3d 471, 579 P.2d 7 (1978) 8
Michigan v. Mosley,
423 U.S. 96 (1975) 8
Michigan v. Tucker,
417 U.S. 433 (1974) 8,18
Miranda v. Arizona,
384 U.S. 436 (1966) 3, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19
Oregon v. Hass,
420 U.S. 714 (1975) 8
Oregon v. Mathiason,
429 U.S. 492 (1977) 8
Scott v. State,
251 Ark. 918, 475 S.W.2.d 699 (1972) 8
State v. Butler,
244 S.E.2d 410 (1978) 14, 15

United States ex rel. Chabonian v. Leik, Warden,
366 F. Supp. 82 (E.D. Wis. 1973) 10, 11
United States v. Millen,
338 F. Supp. 747 (E.D. Wisc. 1972) 8

Books

Inbau and Reid, "Criminal Interrogations and Confessions," Second Ed., Baltimore Md., Williams and Wilkins, Co., 1967 16

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78 - 534

STATE OF NORTH CAROLINA,
Petitioner,

v.

WILLIE THOMAS BUTLER,
Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF, AMICI CURIAE, IN SUPPORT OF THE PETITIONER

Comes now Americans For Effective Law Enforcement, Inc., North Carolina Association of Chiefs of Police, Inc., North Carolina District Attorneys Association, Inc., North Carolina Police Executives Associations, Inc., North Carolina Association of Police Attorneys, Inc., North Carolina Sheriffs Association,, Inc., who respectfully move this Court for leave to file a brief amici curiae in support of the petitioner. Counsel for

petitioner, the State of North Carolina has consented in writing to our filing and a letter to this effect has been lodged witht he Clerk of the Court. Counsel for respondent, Butler, has denied our request for consent to file. Accordingly we are moving the Court for leave to file. The interest of the amici and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.

2, To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.

3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The North Carolina Association of Chiefs of Police, Inc.; the North Carolina District Attorney's Association, Inc.; the North Carolina Police Executives Association, Inc.; the North Carolina Sheriff's Association, Inc. are all non-partisan, non-political, non-profit organizations whose purpose is to represent the professional law enforcement and prosecutorial officers of the State of North Carolina.

The constituency of each organization is represented in the name of each organization and each organization has, as its common purpose professionalism in the administration of justice through mutual cooperation and exchange of information among its members.

Amici believes this case to be of paramount importance for the State of North Carolina, and nationally. Since Miranda v. Arizona, 384 U.S. 436, was decided in 1967 there has been a growing controversy over its effect on the effectiveness of law enforcement. It is the position of amici that the rigid and inflexible strictures placed upon law enforcement officers and prosecutors by the Miranda decision, particularly as interpreted by some lower courts, have had a deleterious effect upon law enforcement. This case presents this Court with an opportunity to examine the question whether the inflexibility of Miranda should be modified to include a test of the totality of circumstances in determining the validity of waiver of counsel. Thus, the case is of major importance to those who are concerned with the effectiveness of the law enforcement process.

Respectfully submitted,

of counsel:
Kurt C. Stakeman
Raleigh Police Dept.
Box 590
Raleigh, N.C. 26702

Frank Carrington, Esq.
Wayne W. Schmiodt, Esq.
Fred E. Invau, Esq.
Americans For Effective Law Enforcement, Inc.
960 State National Bank Plaza
Evanston, Illinois 60201
(312) 866-8400

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

NO. 78 - 534

STATE OF NORTH CAROLINA,
Petitioner,

v.

WILLIE THOMAS BUTLER,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NORTH CAROLINA

BRIEF, AMICI CURIAE, IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., NORTH CAROLINA ASSOCIATION OF CHIEFS OF POLICE, INC., NORTH CAROLINA DISTRICT ATTORNEYS ASSOCIATION, INC., NORTH CAROLINA POLICE EXECUTIVES ASSOCIATION, INC., NORTH CAROLINA ASSOCIATION OF POLICE ATTORNEYS, INC., NORTH CAROLINA SHERIFFS ASSOCIATION, INC.

ARGUMENT

Amici will not reiterate the legal arguments made by the State of North Carolina, although we

agree with them and wish to associate ourselves with them. We will confine our argument to certain policy issues raised by the question presented by this case.

I. THIS COURT SHOULD ADOPT A "TOTALITY OF CIRCUMSTANCES" TEST IN DETERMINING WAIVER OF THE RIGHT TO COUNSEL.

The question presented by this case is:

> Does federal law prohibit trial judge from finding implied waiver, under totality of circumstances approach, of right to counsel by fully warned defendant who made no specific affirmative oral or written waiver of right to counsel but nonetheless made allegedly voluntary inculpatory statement? 12 Cr. L. 4188, December 13, 1978.

We cite in full the question presented only to place it in juxtaposition with, and to call attention to, the striking similarity between the question presented and the "totality of circumstances" rule for testing waiver of counsel which was suggested by Mr. Justice Clark in his dissenting opinion in Miranda v. Arizona, 384 U.S. 436:

> Under the 'totality of circumstances' rule...I would consider in each case whether the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, that a court wuld appoint one at his request if he was too poor

> to employ counsel. In the absence of counsel the burden would be on the state to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary. 384 U.S. at 503. (emphasis supplied.)

This case presents the Court with the opportunity to adopt the flexible test suggested by Justice Clark, as opposed to the inflexible strictures of Miranda, and we urge the Court to do so, for the following reasons.

A. THE INFLEXIBLE, PER SE RULES ENUNCIATED IN MIRANDA V. ARIZONA HAVE RESULTED IN LOWER COURT INTERPRETATIONS WHICH SUPPRESSED OTHERWISE VOLUNTARY CONFESSIONS, AND HENCE THE TRUTH, IN THE CRIMINAL JUSTICE PROCESS.

This is but another in a line of cases in which lower courts, confronted with the rigid and inflexible language of the majority holding in Miranda, have interpreted that decision in such a way as to require suppression of confessions and admissions which, by any other standard, would have been found to be completely voluntary.

We discussed the problem of the rigidity of Miranda in a brief, amici curiae, filed in December of 1978 before this Court in the case of Fare v. Michael C., No. 78-332, October Term, 1978;[1] consequently we

[1]/Amici were: Americans for Effective Law Enforcement, Inc. (co-amicus in this case) and the California District Attorneys Association, Inc.

will not reiterate our arguments at any length in this brief.

Suffice it to say that such lower court interpretations have been made; and, some of them, as noted by Mr. Justice Rehnquist in his opinion staying the mandate in Fare v. Michael C., supra, have "...evinced no principled limitations."[2]

These cases have turned on such matters as the language used in the Miranda warnings, questions of waiver, and other technical points;[3] but the holding in each case can be traced back to the inflexible, per se rules which Miranda laid down.

To be sure, this Court has consistently refused to extend the Miranda doctrine beyond its original limits;[4] and, indeed, it has prohibited lower courts from making such extensions based upon their own interpretations of the Federal Constitution, at least in those areas in which this Court has "specifically refrained" from extending them.[5] However, this Court can make definitive rulings "specifically refraining" from extending Miranda in only a very

---

[2]/We do not suggest for a moment that the Supreme Court of North Carolina was evincing an unprincipled interpretation in the instant case. To the contrary, a reading of the lower court's opinion indicates clearly that it felt compelled to reach the result that it did precisely because of the inflexibility of the language of Miranda.

[3]/See, e.g.: Commonwealth v. Singleton, 439 Pa. 185, 266 A.2d 753 (1970); Biggerstaff v. State, 491 P.2d 345 (Okla. App. 1971); Scott v. State, 251 Ark. 918, 475 S.W.2d 699 (1972); United States v. Millen, 338 F. Supp. 747 (E.D. Wisc. 1972); DuPont v. United States, 259 A.2d 355 (D.C. App. 1969); In re Michael C., 21 Cal.3d 471; 146 Cal. Rptr. 358 (1978).

[4]/Harris v. New York, 401 U.S. 222 (1971); Michigan v. Tucker, 417 U.S. 433 (1974); Michigan v. Mosley, 423 U.S. 96 (1975); Oregon v. Mathiason, 429 U.S. 492 (1977).

[5]/Oregon v. Hass, 420 U.S. 714 (1975).

limited number of cases.[6] For this reason, we submit that the time has come for the Court to make a general ruling in this case, away from the rigidity of Miranda and towards the "totality of circumstances" test enunciated by Mr. Justice Clark, supra, P. 6.

B. THIS CASE PRESENTS A CLASSIC EXAMPLE OF ALL OF THE REASONS WHY THE RIGIDITY OF MIRANDA SHOULD BE MADE MORE FLEXIBLE.

Three elements are almost invariably present in cases such as this one; and, we submit, these elements dictate the return to the totality of circumstances doctrine discussed above. We will discuss each element briefly.

1. The Factual Guilt of the Defendant is Not Really in Question.

In this case, for example, there is overwhelming evidence of the guilt of the defendant. He was positively identified by the victim of the robbery and attempted murder, and his statements made to the F.B.I. agent indicated knowledge of and participation in a most heinous crime: the armed robbery and attempted murder, by shooting, of an unarmed, innocent victim, resulting in the partial paralysis of that victim.[7]

---

[6]/As Mr. Justice Rehnquist noted in his opinion staying the mandate in Fare v. Michael C.:

"This Court is tendered many opportunities by unsuccessful prosecutors and unsuccessful defendants to review rulings predicated on Miranda and related cases, and, with many issues that recur in petitions before this Court, we decline most such tenders." _____U.S. _____, 99 S.CT.3, at 5. (1978)

[7]/Taking the stand in his own defense, Butler, of course, denied participation in the crime or making inculpatory statements. The jury, however, chose to disbelieve him.

If the holding of the North Carolina Supreme Court is upheld however, Butler's statements indicating his guilt of this crime must be suppressed. Guilt, in effect, become irrelevant. The history of the Fifth Amendment is not consistent with the "irrelevance of guilt" theory which is inherent in Miranda.

The dissenting Justices in Miranda pointed out that the decision flew in the faces of prior precedent, and their contention was not seriously challenged by the majority.[8] Mr. Justice White, for example, characterized the ruling as:

> ...neither compelled nor even strongly suggested by the language of the Fifth Amendment, [and] is at odds with American and English legal history... 384 U.S., at 531.

Nor did the framers of the Bill of Rights have in mind the single-minded protection of the guilty. Rather, that amendment was enacted in order to ensure that no innocent parties were convicted by confessions extorted by Star Chamber tactics, torture, threats or other forms of coercion.

Nevertheless, the historical prespectives of the Fifth Amendment have been radically changed by Miranda. A United States District Judge, in reversing a conviction based on a Miranda "violation," summed up the current situation with admirable candor, stating that the focus of the Fifth Amendment had:

> ...been broadened from protecting the innocent from the possibility of a false confession to protecting the guilty from unfair methods of pro-

---

[8]/Indeed, the majority in Miranda acknowledge that: "In these cases we might not find the defendant's statements to have been involuntary in traditional terms." 384 U.S. at 457.

curing statements from him. (emphasis supplied).[9]

The key word in this quotation is, of course, the word "unfair." Certainly, torture, threats, promises of leniency and so on, are "unfair" methods of obtaining statements, principally because such interrogation techniques could cause an innocent person to confess; and statements so obtained should properly be suppressed.

Miranda, however, dictated a set of new and inflexible prophylactic rules defining "unfairness" in terms excluding confessions obtained by methods which, until Miranda, would have been considered perfectly "fair." Under Miranda the realities of the situation are ignored and, if the rigid, per se rules have been contravened, any statements made must be suppressed, whether they were made voluntarily or not. It is precisely these rules which serve only to protect the guilty. Certainly this is the situation from all appearances in this case.[10]

The fact that patently guilty individuals will have their otherwise voluntary confessions suppressed, and often be freed, because of Miranda exacts a heavy toll upon society, one which was forcast by Mr. Justice White, dissenting in that case:

---

[9]/U.S. ex rel. Chabonian v. Leik, Director, 366 F. Supp. 82 (E.D. Wis. 1973).

[10]/While it is true that the Supreme Court of North Carolina stated that: "...there is other evidence amply sufficient to support a conviction in this case..." (244 S.E.2d, at 413), we submit that this is not the point. First, much evidence in criminal cases is relatively ephemeral: witnesses may die or become otherwise unavailable, or their memories may falter after the lapse of many years. Thus, it cannot be said with certainty that in this case Butler could successfully be retried. Of far more importance, however, is the effect of such rulings on other cases where the defendant could not successfully be retried without the use of the suppressed statements. Thus, insofar as the importance of this case is concerned, it is completely irrelevant whether Butler could be successfully retried or not.

> There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.
>
> I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.
>
> In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain but a loss in human dignity. 384 U.S. at 542.

Mr. Justice White's prophesy has proven to be completely accurate: guilt, in many cases has become irrelevant and the truth in the criminal justice fact-finding process has been suppressed.

2. <u>There Is No Evidence Whatever of Coercion On The Part of the Government Officer.</u>

Although the quotation from the District Court opinion, noted above at P.10, spoke of "unfairness" in the process of obtaining statements from criminal suspects, it is difficult to discern what unfairness took place in this case.

F.B.I. Special Agent Martinez arrested Butler in New York and immediately and fully advised him of

his constitutional rights. The Agent transported Butler to the F.B.I.'s New Rochelle office and again advised him of his rights. Butler read the "Advisement of Rights" form and stated that he understood his rights. He agreed to talk with the Agent but refused to sign the form. He did not ask for an attorney.

There is no evidence in the record of any kind of physical or phychological coercion, nor of any trickery or deceit. Moreover, there is not the slightest indication of any tactics used which would cause an innocent person to confess. The record is relatively straightforward: the subject was advised verbally of his rights (twice) and read and understood the "Advisement of Rights" form. He refused to sign the form, or anything else for that matter, but he agreed to talk with the Agent and did talk with him, making inculpatory statements.

Thus any "unfairness" in this case must stem from the fact that the F.B.I. Special Agent ran up against the stone wall of the per se Miranda rules, at least as the Supreme Court of North Carolina interpreted them; by any other standard his actions as an interrogator of a criminal suspect cannot be faulted.

3. Butler's Statements Were, By Any Objective Standard, Voluntarily Made.

Butler's refusal to sign the "Advisement of Rights" form concedely forecloses any contention that he made a written waiver of his right to counsel.

The Supreme Court of North Carolina, in addition, held that since Butler made no express oral waiver of counsel his statements must be suppressed. The lower court relied principally on the

language in Miranda that waiver will not be presumed unless "specifically made":

> No effective waiver of the right to counsel during interrogation can be given unless specifically made after the warnings have been given. 384 U.S. at 470 (emphasis supplied).

This is one of the more rigid and restrictive paragraphs in Miranda; there is no flexibility in it whatsoever. When language such as this is applied to cases like this one, logic and commonsense break down.

It is relatively clear from the record that Butler understood his rights, including his right to an attorney. He had been advised, verbally of his rights (twice), had read the advisement form, and told the F.B.I. Agent that he understood them.

Miranda, as interpreted by the North Carolina Supreme Court, presumes that Butler's statements were involuntarily made, and therefore inadmissible, because no express waiver of counsel was "specifically made." The question now before this Court is whether, in the totality of circumstances, the trial judge must be prohibited from finding implied waiver.

Special Agent Martinez' testimony regarding this matter, while given somewhat ingenuously, is a masterpiece of common sense as opposed to per se rules:

> He never told us that he did not want the lawyer present. He never told us that he did want a lawyer present. ...He said, "I won't sign the form. I will talk to you but I won't sign the form." What made me believe that he did not want a lawyer present at that time was the fact that he

was relating the story concerning the charges against him at that point. If he wanted an attorney present with him he wouldn't have said anything. 244 S.E.2d at 412.

We cannot conceive of a more clear-cut case where, in the totality of circumstances, a confession would be found to be voluntary.

The question then is squarely before this Court: must the inflexible language of Miranda control in every case involving waiver, or should the totality of circumstances rationale, suggested by Mr. Clark, supra p. 6 be adopted? We submit that, at least in cases such as this one, in which 1) there is little or no doubt of the suspect's factual guilt; 2) there is no evidence of coercion; and 3) the statements made were by any objective standard voluntary, the totality of circumstances doctrine should be adopted.

II. INTERROGATION OF CRIMINAL SUSPECTS IS ESSENTIAL TO EFFECTIVE LAW ENFORCEMENT AND SHOULD NOT BE FRUSTRATED BY OVER-RIGID, PROPHYLACTIC RULES.

Each of the dissenting Justices in Miranda commented, directly or indirectly upon the necessity for criminal interrogation in the law enforcement process.[11] Writers on the subject have also described the problems which arise if custodial interrogation

[11]/"Custodial interrogation has long been recognized as 'undoubtedly an essential tool in effective law enforcement'." 384 U.S. at 501, Clark, J., dissenting.

"What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it." 384 U.S., at 516. Harlan, Stewart and White, J.J., dissenting.

is banned, or so severely limited as to become ineffective:

> One completely false assumption accounts for most of the legal restrictions on police interrogations. It is this... whenever a crime is committed, if the police will only look carefully at the crime scene they will almost always find some clue that will lead them to the offender and at the same time establish his guilt; and once the offender is located, he will readily confess or disclose his guilt by trying to shoot his way out of the trap. But this is pure fiction; in actuality the situation is quite different. As a matter of fact, the art of criminal investigation has not developed to a point where the search for and examination of physical evidence will always, or even in most cases, reveal a clue to the identity of the perpetrator or provide the necessary proof of his guilt. In criminal investigations even of the most efficient type, there are many, many instances where physical clues are entirely absent, and the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself, as well as others who may possess significant information.[12]

Finally, Mr. Justice Black, who was, of course, a majority Justice in Miranda, nevertheless stated, in another context, one of the most succinct summations of the problem ever made:

> It is always easy to hint at mysterious

---

[12]/Inbau and Reid, "Criminal Interrogations and Confessions," Second Ed., Baltimore, Md., Williams and Wilkins, Co., 1967, P. 213.

means available just around the corner to catch outlaws.[13].

We do not wish to belabor the point that custodial interrogation is an essential concomitant of effective law enforcement, but rather to point out the extent to which good-faith efforts to enforce the law can be frustrated if the strictures placed upon them are sufficiently inflexible.

As Mr. Justice Rehnquist noted in his opinion staying the mandate in Fare v. Michael C., proponents of the Miranda decision have claimed that rigid, per se rules give the police clear-cut guidance in cases dealing with confessions.[14] Such a contention might well be accurate if we were dealing with an area less difficult than the enforcement of the criminal law; but we are not.

Law enforcement is a volatile business. No two situations can ever be the same in the confrontation between the policeman and the criminal because all are human beings, subject to the vicissitudes of human nature. There are, and should be, rules which police officers are required to observe, and we believe that most officers do attempt to comply with the rules which circumscribe their conduct; but the innumerable factual variations which can arise in any law enforcement-related situation militate against the application of the sort of wholly inflexible, per se rules which Miranda created.

The case in point presents an excellent example. The officer involved was an agent of the Federal Bureau of Investigation, who we may assume, was as well-trained, if not better-trained, than most law

---

[13]/ Berger v. New York, 384 U.S. 41, at 73 (1967), Black, J. dissenting.

[14]/ _____U.S. _____, 99 S. Ct. 3, at 5, (1978).

enforcement officers in the country. He engaged in no coercive tactics; and, as he testified, he believed that everything that he did, insofar as the questioning of Butler was concerned, was perfectly proper. Now, the lower court has held that he ran afoul of the no-waiver-unless-specifically-made language of Miranda. Agent Martinez' good faith efforts to enforce the law have thus been frustrated.

A majority of this Court addressed this point in Michigan v. Tucker:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error therefore, we should consider whether the sanction serves a valid and useful purpose. 417 U.S. 433, at 446 (1974).

If the holding of the lower court were to be affirmed, we would indeed be "penalizing police error." In a broader sense, society would also be penalized, because the necessary, even essential, law enforcement technique of custodial interrogation, without coercion and which elicited voluntary inculpatory statements, would have been wholly frustrated. This is another reason for this Court to return to the "totality of circumstances" standard.

CONCLUSION

Prior to this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), the standard for

judging the admissibility of confessions was whether that confession was voluntarily made "in the totality of the circumstances." Miranda laid down a set of rigid rules under which lower courts have suppressed many confessions despite the fact that: 1) there was little doubt as to the factual guilt of the suspect; 2) no coercive tactics were used by the police; and, 3) the confession was voluntary by any objective standard.

This case presents this Court with the question whether the totality of the circumstances may be considered by lower courts in determining whether counsel was effectively waived by a criminal suspect.

We urge this Court to answer this question in the affirmative and to reverse the judgment of the Supreme Court of North Carolina.

Respectfully submitted,

Frank Carrington, Esq.
Wayne W. Schmidt, Esq.
Fred E. Inbau, Esq.
Americans for Effective Law Enforcement, Inc.
960 State National Bank Plaza
Evanston, IL. 60201
(312) 866-8400

of counsel:
Kurt C. Stakeman
Raleigh Police Dept.
Box 590
Raleigh, N.C. 26702

No. 78-354

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF NORTH CAROLINA, PETITIONER

v.

WILLIE THOMAS BUTLER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW J. LEVANDER
Assistant to the Solicitor General

JOHN VOORHEES
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Interest of the United States	1
Question presented	2
Constitutional provisions involved	2
Statement	2
Summary of Argument	6
Argument:	
A voluntary waiver of *Miranda* rights does not require that the accused either sign a waiver of rights form or expressly decline the right to counsel	8
A. The *Miranda* decision does not require an express declination of counsel	8
B. A rule requiring express declination of the right to counsel as a prerequisite of a valid waiver of *Miranda* rights conflicts with the Court's post-*Miranda* decisions	18
Conclusion	23

CITATIONS

Cases:

Blackmon v. *Blackledge*, 541 F.2d 1070	20
Bond v. *United States*, 397 F.2d 162, cert. denied, 393 U.S. 1035	15
Brewer v. *Williams*, 430 U.S. 387	20-21
Brown v. *Illinois*, 422 U.S. 590	19
Carnley v. *Cochran*, 369 U.S. 506	20

Cases—Continued Page

Chambers v. *Florida*, 309 U.S. 227 9
Doyle v. *Ohio*, 426 U.S. 610 10
Fare v. *Michael C.*, No. A-33 (July 28, 1978) 17
Frazier v. *Cupp*, 394 U.S. 731 ..... 19, 20
Harris v. *New York*, 401 U.S. 222 10
Haynes v. *Washington*, 373 U.S. 503 9
Hughes v. *Swenson*, 452 F.2d 866 20
Johnson v. *Zerbst*, 304 U.S. 458 20
Keegan v. *United States*, 385 F.2d 260, cert. denied, 391 U.S. 967 20
Kirby v. *Illinois*, 406 U.S. 682 20
Malloy v. *Hogan*, 378 U.S. 1 9
Michigan v. *Mosley*, 423 U.S. 96 .....7, 12, 18, 19
Michigan v. *Tucker*, 417 U.S. 433 .....8, 9, 10, 11
Mincey v. *Arizona*, No. 77-5353 (June 21, 1978) 10
Miranda v. *Arizona*, 384 U.S. 436 .....*passim*
Oregon v. *Hass*, 420 U.S. 714 19
Schneckloth v. *Bustamonte*, 412 U.S. 218.. 20
State v. *Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 20
United States v. *Boston*, 508 F.2d 1171, cert. denied, 421 U.S. 1001 15
United States v. *Caulton*, 498 F.2d 412, cert. denied, 419 U.S. 898 15
United States v. *Cooper*, 499 F.2d 1060.... 15, 21
United States v. *Crisp*, 435 F.2d 354, cert. denied, 402 U.S. 947 15
United States v. *Ganter*, 436 F.2d 364.... 20
United States v. *Guzman-Guzman*, 488 F.2d 965 15
United States v. *Hayes*, 385 F.2d 375, cert. denied, 390 U.S. 1006 21

Cases—Continued Page

United States v. *McDaniel*, 463 F.2d 129, cert. denied, 413 U.S. 919 21
United States v. *Marchildon*, 519 F.2d 337 20
United States v. *Montos*, 421 F.2d 215, cert. denied, 397 U.S. 1022 20
United States v. *Moreno-Lopez*, 466 F.2d 1205 15
United States v. *Speaks*, 453 F.2d 966, cert. denied, 405 U.S. 1071 15
United States v. *Springer*, 460 F.2d 1344, cert. denied, 409 U.S. 873 21
United States v. *Stewart*, 585 F.2d 799, petition for cert. pending, No. 78-6007.. 20
United States v. *Stuckey*, 441 F.2d 1104, cert. denied, 404 U.S. 841 15
United States v. *Thompson*, 417 F.2d 196, cert. denied, 396 U.S. 1047 15
United States v. *Washington*, 431 U.S. 181 20
United States v. *Zamarripa*, 544 F.2d 978, cert. denied, 429 U.S. 111 15
Wan v. *United States*, 266 U.S. 1 9
Watts v. *Indiana*, 338 U.S. 49 9
White v. *Texas*, 310 U.S. 530 9

Constitution:

United States Constitution:

Fifth Amendment 2, 9, 10, 12, 19
Sixth Amendment 20
Fourteenth Amendment 2, 9

Statutes: Page

18 U.S.C. 3501(b) 21
N.C. Gen. Stat. (1969):
§ 14-32(a) 3
§ 14-39 3
§ 14-87 3

Rules:

Fed. R. Crim. P 5(a) 8

Miscellaneous:

Comment, *The Refusal of an Accused to Sign a Written Miranda Rights Waiver Form After His Oral Affirmation of His Understanding of Those Rights Will Not Defeat a Showing of a Valid Waiver*, 43 Geo. Wash. L. Rev. 895 (1975) 21
Comment, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. Chi. L. Rev. 413 (1969).. 15

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-354

STATE OF NORTH CAROLINA, PETITIONER

v.

WILLIE THOMAS BUTLER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents an important question concerning the legal standards governing waiver of the Fifth Amendment privilege against compulsory self-incrimination following receipt of the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Although this is a state prosecution, the statements at issue here were obtained by FBI agents acting in accordance with standard FBI procedures. Moreover, a substantial number of federal prosecutions involve the admis-

sion of statements freely made by a defendant after he has been advised of his *Miranda* rights. Accordingly, the United States has a direct and significant interest in the determination whether a defendant's express declination of the right to counsel is a necessary prerequisite to an oral waiver of *Miranda* rights.

QUESTION PRESENTED

Whether a defendant's decision to answer questions immediately after being advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), is nonetheless insufficient to establish a waiver of those rights in the absence of an express declination of the right to counsel.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

Following a jury trial in the Superior Court of the State of North Carolina (Wayne County), respondent was convicted of kidnaping, armed robbery, and felonious assault, in violation of N.C. Gen. Stat. §§ 14-39, 14-87, and 14-32(a) (1969). He was sentenced to life imprisonment on the kidnaping and armed robbery counts and five years' imprisonment on the assault count, all sentences to run concurrently. The Supreme Court of North Carolina reversed the convictions and remanded for a new trial (Pet. App. A-1 to A-8).

The evidence at trial showed that at approximately 11:00 p.m. on December 28, 1976, respondent and a friend named Elmer Lee went to a gas station in Goldsboro, North Carolina, to buy beer. The attendant, Ralph Burlingame, told respondent and Lee that the station was closed, and the two men appeared to depart. However, as Burlingame left the station minutes later, respondent and Lee approached him with drawn guns and ordered him to drive them away in his automobile. Once inside the car, respondent informed Burlingame that they were going to rob and then shoot him. Burlingame immediately attempted to escape by leaping from the moving vehicle, but he was shot in the back as he jumped from the car. After they had stopped the car, respondent and Lee returned to the spot where Burlingame lay, stole his wallet containing $30, and each shot him again.[1] Although the attack left Burlingame paralyzed from the waist down, he survived and later identified respondent and Lee from a photographic array as his

[1] Ballistics evidence established that the bullets removed from Burlingame's back were fired from two different guns (R. 73).

assailants and testified in court that he was certain respondent was the man who had shot him (Pet. A-1 to A-2).

On the basis of a North Carolina fugitive warrant, FBI agents arrested respondent on May 3, 1977, in the Bronx, New York. The agents gave respondent the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and transported him to the FBI office in New Rochelle, New York. During this 15 minute drive, the agents did not ask respondent any questions related to the North Carolina incident and respondent did not make any statements (Pet. App. A-3; App. 2-5, 24-25, 29).

Upon arriving at the FBI office, Agents Richard Berry and David Martinez took respondent to an interview room and again advised him of his *Miranda* rights. After ascertaining that respondent had an eleventh grade education and that he was literate, the agents gave respondent the standard FBI "Advice of Rights" form and asked him to read it over and sign it.[2] Respondent read the form and told the

[2] This form (FD-395) reads as follows (Pet. 7):

"YOUR RIGHTS"

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer.

"WAIVER OF RIGHTS"

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed _____

agents that he understood his rights but that "he didn't want to sign this form and that he didn't want to sign anything." At that point, the agents again informed respondent that he did not have to talk with them or sign the form and that he could have an attorney present, but that they would like to ask him questions. Respondent replied: "I will talk to you but I am not signing any form." Respondent then made a number of incriminating statements that were later introduced at trial.[3] At no time during the interview did respondent request counsel or attempt to end the questioning (Pet. App. A-3 to A-5; App. 3, 5-6, 14-19, 20-23, 25-26, 30-31).

Respondent moved to suppress the incriminating statements made to the FBI agents on the ground that he had not waived his constitutional right to the presence and assistance of counsel (Pet. App.

[3] Respondent admitted that he and Lee had been drinking heavily and had decided to rob a gas station. Respondent claimed, however, that he had not participated in the actual robbery and that it was Lee who had shot the attendant (App. 6-7, 10-11, 12-13, 26-27, 31-32).

A-3). After an evidentiary hearing at which Agent Martinez's testimony concerning respondent's FBI interview was uncontradicted, the trial court found that respondent "understood his rights," "freely and voluntarily [spoke] to [the] agent after having been advised of his rights as required by the Miranda ruling," and "effectively waived his rights, including the right to have an attorney present during the questioning, by his indication that he was willing to answer questions" (App. 22-23). On appeal, the Supreme Court of North Carolina reversed. Relying upon this Court's statement in *Miranda* v. *Arizona*, *supra*, 384 U.S. at 470, that "[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given," the court below held that respondent's failure to sign the waiver card or expressly to decline the assistance of counsel precluded a finding of waiver on this record (Pet. App. A-5 to A-8).

SUMMARY OF ARGUMENT

In suppressing respondent's incriminating post-arrest statements to FBI agents, the Supreme Court of North Carolina held that, in the absence of a signed written waiver, an accused cannot waive the rights established by this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), without an express declination of counsel. But *Miranda* itself does not set forth any mandatory waiver procedure, much less hold that an accused must expressly state that he

does not wish to consult with an attorney before questioning may begin. Moreover, the unyielding waiver rule adopted by the court below would unduly hamper proper police investigative work and would upset the balance struck by *Miranda* between the protection of Fifth Amendment rights and the reasonable needs of law enforcement. As the Court repeatedly stated in *Miranda*, once a person in custody has been properly informed of his rights, the authorities may question him until and unless he indicates in some manner that he desires either to consult with counsel or to remain silent. The FBI agents complied with that command here.

In addition to constituting an unwarranted extension of *Miranda*, the decision below is inconsistent with a number of this Court's rulings involving the propriety of police procedures during custodial interrogation. In *Michigan* v. *Mosley*, 423 U.S. 96 (1975), for example, in upholding the admissibility of certain post-arrest statements made in the absence of an express waiver of the right to counsel, the Court noted only that the defendant had never asked to speak with an attorney. Indeed, the facts of this case present an even stronger instance of voluntary waiver, since respondent not only never indicated a desire to remain silent or to consult with counsel but also told the FBI agents that he would be willing to talk to them. The federal courts of appeals have unanimously agreed that, in similar circumstances, an accused may waive his *Miranda* rights without

signing a waiver form or expressly declining the right to counsel.

Finally, the *per se* rule applied by the court below is at odds with the "totality of the circumstances" approach to waiver problems long favored by this Court. The case by case analysis required by that approach is particularly appropriate to the circumstances of custodial interrogations, given the wide variety of situations in which such interrogation may occur. Here, without any suggestion of coercion, respondent affirmatively and deliberately chose to talk to the FBI agents immediately after acknowledging that he understood his rights. His subsequent statements were therefore correctly admitted at trial.

ARGUMENT

A VOLUNTARY WAIVER OF *MIRANDA* RIGHTS DOES NOT REQUIRE THAT THE ACCUSED EITHER SIGN A WAIVER OF RIGHTS FORM OR EXPRESSLY DECLINE THE RIGHT TO COUNSEL

A. The *Miranda* Decision Does Not Require An Express Declination of Counsel.

1. Prior to this Court's decision in *Miranda* v. *Arizona*, *supra*, the admissibility of a defendant's post-arrest statements principally involved consideration of whether such statements could be characterized as "voluntary." See *Michigan* v. *Tucker*, 417 U.S. 433, 441 (1974). Thus, insofar as constitutional doctrine was concerned,[4] the primary inquiry was

[4] Statutes or supervisory rules such as Fed. R. Crim. P. 5(a) tended to limit the instances of abuse in post-arrest interrogation in some jurisdictions. See *Miranda* v. *Arizona*, *supra*, 384 U.S. at 463.

whether the circumstances and techniques of custodial interrogation were so fundamentally unfair that the confession should be suppressed as a matter of due process. See, *e.g.*, *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *White* v. *Texas*, 310 U.S. 530 (1940); *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Wan* v. *United States*, 266 U.S. 1 (1924).

In *Miranda*, the Court shifted the locus of constitutional protection against compelled confessions from the Due Process Clause to the Self-Incrimination Clause. *Miranda* v. *Arizona*, *supra*, 384 U.S. at 457; *Michigan* v. *Tucker*, *supra*, 417 U.S. at 443.[5] "To supplement this new doctrine, and to help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost, the Court in *Miranda* established a set of specific protective guidelines * * *." *Ibid.* These now familiar rules require that "[p]rior to any [custodial] questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda* v. *Arizona*, *supra*, 384 U.S. at 444. Any statement obtained from a

[5] Two years earlier, in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), the Court held that the privilege against compulsory self-incrimination was protected by the Fourteenth Amendment against abridgment by the states.

defendant during the course of custodial interrogation and prior to the complete recitation of these warnings is inadmissible, even though the statement may in fact be wholly voluntary. *Id.* at 444-445, 467-474. See *Michigan* v. *Mosley*, 423 U.S. 96, 99-100 (1975).[6]

Miranda, however, did not preclude all custodial interrogation. Rather, the Court attempted to strike a balance between the protection of Fifth Amendment rights and the reasonable needs of law enforcement. 384 U.S. at 479-486. Thus, the Court specifically stated on several occasions that once the accused has received the appropriate warnings, law enforcement authorities may commence their questioning until and unless he "indicates in any manner and at any stage of the process that he wishes to consult with an attorney * * * [or] that he does not wish to be interrogated * * *." *Id.* at 444-445; see also *id.* at 467-472, 473-474. Any statement elicited from the accused during such questioning may be introduced at trial, provided that the government sufficiently establishes that the accused waived his rights "voluntarily, knowingly, and intelligently." *Id.* at 444, 475-476, 478, 479. See, *e.g.*, *Michigan* v. *Tucker*, *supra*, 417 U.S. at 444.

[6] If a statement obtained in violation of *Miranda* is nonetheless found to be voluntary in the traditional sense, the prosecution may use that statement to impeach the defendant's contradictory testimony at trial. See *Mincey* v. *Arizona*, No. 77-5353 (June 21, 1978), slip op. 9-15; *Oregon* v. *Hass*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971).

2. This case focuses upon the circumstances properly constituting a voluntary, knowing and intelligent waiver of the right to remain silent, as construed and protected by this Court's decision in *Miranda*.[7] As noted above, the *Miranda* decision repeatedly recognized that after the authorities have effectively informed the accused of his *Miranda* rights they may question him until such time as he chooses to exercise either his right to remain silent or his right to consult with counsel (384 U.S. at 473-474; emphasis added and footnote omitted):

> Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege*; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. *If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.* At that time, the individual must have an opportunity to confer with the attorney and to

[7] The Court recognized in *Miranda* that the prophylactic rules established therein were not required by the Constitution. 384 U.S. at 467. See *Doyle* v. *Ohio*, 426 U.S. 610, 617 (1976); *Michigan* v. *Tucker*, *supra*, 417 U.S. at 444.

> have him present during any subsequent questioning. *If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.*

See also *id.* at 444-445, 467, 472.

Thus, if the accused has been informed of and understands his *Miranda* rights, his subsequent statements will be admissible unless he has manifested in some fashion an intent to exercise his Fifth Amendment rights. Where the accused asks for an attorney, affirmatively indicates that he does not wish to answer questions, or even stands completely silent under circumstances suggesting a decision to discontinue the interrogation, law enforcement officers must "scrupulously honor []" his decision by immediately terminating the questioning (384 U.S. at 479). See *Michigan* v. *Mosley*, *supra*, 423 U.S. at 103-104. On the other hand, where the government shows that the accused was fully aware of his *Miranda* rights and nonetheless responded to questions or offered a confession, there is no reason why those statements should not be used against the defendant even though he may not have signed a waiver form or otherwise prefaced his statements with an express oral waiver of his rights. See note 10, *infra*.[8]

[8] Of course, the refusal to sign a waiver form or to give an oral waiver may perhaps constitute a sufficient affirmative indication of the desire to assert Fifth Amendment rights so as to require a cessation of custodial questioning. As we discuss below (see Part B, *infra*), the trial judge must evaluate all of the relevant circumstances in determining the issue of waiver.

Here, the uncontradicted version of the events surrounding respondent's interrogation demonstrates that the FBI agents fully complied with both the rules established in *Miranda* and the standard FBI procedures that were expressly approved by the Court at that time.[9] The agents read respondent his rights on

[9] 384 U.S. at 483-486. The relevant portion of the current FBI policy provides as follows:

> 7-4 *WAIVER OF RIGHTS*
>
> Before a statement can be admitted into evidence, the Government must prove that the suspect fully understood the warnings and freely decided to answer questions. A suspect who remains silent after receiving warnings has not agreed to be questioned.
>
> 7-4.1 *Policy*
>
> (1) *Use of Form FD-395*—Inasmuch as the Government will have to meet a "heavy burden" in establishing that an accused knowingly and intelligently waived his rights, it is desirable that the subject's acknowledgment of the warnings and his waiver be obtained in writing. FD-395 should be used for this purpose. Completion of this form by the suspect provides documentary proof of both the warning and waiver of rights; consequently, the words of the full warning and waiver should not be repeated in the FD-302 reporting the results of the interview. State only the fact that the accused was warned of his rights and that he waived them, "as shown on an executed warning and waiver form"; this notation should appear immediately before the report's recitation of what the accused said in his statement.
>
> (2) *Signed Statement and FD-395*—If the subject waives his rights and is willing to furnish a written statement, the Agent may write or print "Statement" immediately below the waiver and then proceed to record the statement given. The words of the warning and waiver should not be repeated in the body of the statement. The completed statement should be signed and wit-

two separate occasions prior to any questioning and, upon ascertaining that respondent was literate, gave him the standard FBI advice of rights form to read (App. 3-4, 5-6, 15, 20-22, 25-26). Respondent read

---

nessed at the bottom, and each page initialed by the subject.

(3) *Refusal to Sign FD-395*—If the accused is willing to waive his rights but will not sign Form FD-395, use the blank space on the form to record the language in which he indicated his willingness to waive (precise quotation if possible) and then execute the form in all respects other than his signature.

(4) *Refusal to Waive*—If the accused refuses to waive, the words and the fact of his refusal should be written in the blank space and the form should then be executed in all other respects.

(5) *FD-395; Impossible or Impractical to Use*—In any situation in which the written form is impossible or impractical to use, an acknowledgment of rights and a waiver of those rights can be obtained orally from the suspect. If FD-395 is not used, the justification therefor must be set out in the cover pages of the report setting forth the results of the interview. Although the oral warning and waiver need not be given in any particular form, they must conform substantially to the language found in FD-395. The testimony of the Agent that the warning was administered, that the suspect expressly stated his willingness to make a statement, and that he did not want a lawyer should suffice to carry the Government's burden.

In order to ensure the admissibility of statements made by an accused in custody, the FBI policy suggests that the agent obtain either a written waiver or an express oral waiver of the right to remain silent. Although such express waivers are not required by *Miranda*, proof of waiver is obviously facilitated where (as here) either form of express waiver is obtained. In contrast, the policy does not suggest that an agent attempt to obtain an express oral declination of counsel.

the form and acknowledged that he understood his rights (*ibid.*). The agents then asked whether he wished to sign the waiver form and whether he would consent to answer questions, even though he was not required to do so. Respondent replied that, although he would not sign the form, he would talk to the agents (Pet. App. A-4; App. 5-6, 15-17, 22, 26). He then proceeded to answer their questions (App. 6-7, 10-13, 26-27).

Despite this evidence, the Supreme Court of North Carolina held that respondent had not waived his rights because he had never signed the FBI waiver form or expressly declined the assistance of counsel.[10]

---

[10] The court did not intimate that a signed or written waiver is always necessary. The federal courts of appeals have unanimously held that *Miranda* does not require such proof of waiver and that the fact that the accused refuses to sign a waiver form does not preclude a finding of waiver. See, *e.g.*, *United States* v. *Speaks*, 453 F.2d 966, 968-969 (1st Cir.), cert. denied, 405 U.S. 1071 (1972); *United States* v. *Boston*, 508 F.2d 1171, 1175 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975); *United States* v. *Stuckey*, 441 F.2d 1104 (3d Cir.), cert. denied, 404 U.S. 841 (1971); *United States* v. *Thompson*, 417 F.2d 196 (4th Cir. 1969), cert. denied, 396 U.S. 1047 (1970); *United States* v. *Guzman-Guzman*, 488 F.2d 965 (5th Cir. 1974); *United States* v. *Caulton*, 498 F.2d 412 (6th Cir.), cert. denied, 419 U.S. 898 (1974); *United States* v. *Crisp*, 435 F.2d 354, 358 (7th Cir. 1970), cert. denied, 402 U.S. 947 (1971); *United States* v. *Zamarripa*, 544 F.2d 978, 981 (8th Cir. 1976), cert. denied, 429 U.S. 1111 (1977); *United States* v. *Moreno-Lopez*, 466 F.2d 1205 (9th Cir. 1972); *Bond* v. *United States*, 397 F.2d 162, 165 (10th Cir. 1968), cert. denied, 393 U.S. 1035 (1969); *United States* v. *Cooper*, 499 F.2d 1060, 1062-1063 (D.C. Cir. 1974). See generally Comment, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. Chi. L. Rev. 413, 426-429 (1969).

In reaching this conclusion the court relied primarily (Pet. App. A-6) on the following passage from *Miranda* (384 U.S. at 470):

> An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given.

But this language, particularly when read in conjunction with the other portions of *Miranda* quoted above, establishes only that a waiver of the right to counsel during custodial interrogation cannot be presumed from the failure to request counsel prior to the recitation of the *Miranda* warnings.[11] Instead, a waiver of the right to counsel, like a waiver of the right to remain silent, can occur only after the required warnings have been given and the accused has been made aware of his legal rights.

3. Nor does the decision below effectuate the policies underlying *Miranda*. That decision reflects the

[11] The court also relied (Pet. App. A-6) upon another portion of *Miranda* that states that "[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." 384 U.S. at 475. This portion of the opinion, which was, of course, unnecessary to the Court's decision, does not purport to limit the possible situations that could constitute a waiver. Especially in light of the other passages from *Miranda* quoted at length above, it cannot be said to mandate the result reached below.

judgment that custodial interrogation, even when carried out in compliance with the Due Process Clause, may be inherently coercive and therefore may tend to undermine the intelligent exercise of the self-incrimination privilege. 384 U.S. at 445-458. To offset the perceived coercion in such interrogation, this Court promulgated a series of warnings that must be administered by the police prior to commencing questioning. Therefore, the purpose of the *Miranda* rules is accomplished when the accused has been given the appropriate warnings and understands his rights. At that point, the coerciveness of the custodial interrogation has been substantially dispelled and the accused can make an informed decision to talk with his detainers.

The prophylactic rules announced in *Miranda* thus represent a careful accommodation of the rights of the accused and the reasonable and legitimate needs of law enforcement officials. By requiring that an accused make particular talismanic responses before his voluntary and uncoerced statements may be admitted in evidence, the court below has upset this balance. See *Fare* v. *Michael C.*, No. A-33 (July 28, 1978) (Rehnquist, Circuit Justice). While such technicalities may perhaps be appropriate in other contexts, such as the entry of a guilty plea, a detailed check list of specific questions and approved responses is impracticable and unwarranted in the context of a criminal investigation.[12] In sum, the in-

[12] Although the North Carolina Supreme Court did not require that the accused also state that he knew he could have

stant decision "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity * * *." *Michigan* v. *Mosley, supra,* 423 U.S. at 102.

B. A Rule Requiring Express Declination of the Right to Counsel as a Prerequisite of a Valid Waiver of *Miranda* Rights Conflicts with the Court's Post-*Miranda* Decisions.

1. Although this Court has never directly held that a person may waive his *Miranda* rights without specifically stating that he does not desire counsel, an analysis of several of the Court's post-*Miranda* decisions strongly suggests that the decision below constitutes an unwarranted extension of *Miranda.* For example, in *Michigan* v. *Mosley, supra,* the Court considered whether an accused's initial invocation of his right to remain silent concerning one crime precluded his subsequent waiver of that right when, after several hours, a different police officer gave him *Miranda* warnings for a second time and began to question him concerning an unrelated crime. In concluding that the statements made following the second warnings were admissible, the Court pointed out that the accused, like respondent, had never affirmatively indicated at any time that he desired to consult with counsel (423 U.S. at 97, 98, and 104 n.10). Nonetheless, the Court noted that "there is no

---

an attorney appointed but that he still did not wish counsel, such a requirement is a logical extension of the court's insistance that the waiver be "specifically made" (Pet. App. A-7).

claim that the procedures followed during [the second] interrogation of Mosley, standing alone, did not fully comply with the strictures of the *Miranda* opinion." *Id.* at 98 (footnote omitted).[13] This conclusion is patently inconsistent with the holding below.

Similarly, in *Oregon* v. *Hass,* 420 U.S. 714, 715-716, 723 (1975), the defendant—like respondent—made several incriminating statements immediately after receiving *Miranda* warnings. During the course of the custodial interrogation, the accused remarked that he "was in a lot of trouble" and would like to telephone his attorney. The lower court held, and this Court appeared to assume, that the statements made prior to the moment that the accused affirmatively manifested an intent to exercise his right to counsel were admissible. *Id.* at 716, 723. In other words, an accused's *Miranda* rights are not violated until "the officer * * * continues his interrogation after the suspect asks for an attorney." *Id.* at 723. See also *Brown* v. *Illinois,* 422 U.S. 590, 594-595 (1975); *Frazier* v. *Cupp,* 394 U.S. 731, 738 (1969).

2. In suppressing respondent's statements, the North Carolina Supreme Court essentially established a *per se* rule concerning the waiver of *Miranda* rights: In the absence of a signed waiver, an accused will not be held to have waived his Fifth

---

[13] Indeed, the Court indicated that it might have reached a different result if Mosley had actually indicated a desire for counsel. See 423 U.S. at 104 n.10.

Amendment rights[14] unless he states expressly both that he is willing to talk and that he does not desire the assistance of counsel. See also *State* v. *Blackmon*, 280 N.C. 42, 185 S.E.2d 123 (1971). Thus, not only does the decision below conflict with the relevant *Miranda* decisions of this and other courts,[15] but also its unyielding approach is conceptually at odds with the "totality of the circumstances" analysis that the Court has long applied in determining waiver questions. See, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Frazier* v. *Cupp*, *supra*, 394 U.S. at 739; *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *United States* v. *Washington*, 431 U.S. 181, 188 (1977); *Brewer* v. *Williams*, 430 U.S. 387, 435-436

[14] Although some language in the court's opinion, and its quotation from *Carnley* v. *Cochran*, 369 U.S. 506 (1962), suggest that it considered the Sixth Amendment right to counsel to be implicated here (Pet. App. A-6, A-7), this case involves the Self-Incrimination Clause alone, as protected by *Miranda's* prophylactic rules. The Sixth Amendment "right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against" an accused. *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972).

[15] See, *e.g.*, *United States* v. *Stewart*, 585 F.2d 799 (5th Cir. 1978), petition for cert. pending, No. 78-6007; *Blackmon* v. *Blackledge*, 541 F.2d 1070, 1073 (4th Cir. 1976); *United States* v. *Marchildon*, 519 F.2d 337, 343-344 (8th Cir. 1975); *Hughes* v. *Swenson*, 452 F.2d 866 (8th Cir. 1971); *United States* v. *Ganter*, 436 F.2d 364, 369-370 (7th Cir. 1970); *United States* v. *Montos*, 421 F.2d 215, 224 (5th Cir.), cert. denied, 397 U.S. 1022 (1970); *Keegan* v. *United States*, 385 F.2d 260 (9th Cir. 1967), cert. denied, 391 U.S. 967 (1968). See note 10, *supra*.

& n.5 (1977) (White, J., dissenting).[16] And this case by case approach is equally appropriate to waiver analysis in the wide ranging circumstances of custodial interrogation.

Given the totality of the circumstances presented in this case, we believe that the trial judge correctly concluded that respondent knowingly and voluntarily waived his right to remain silent. Although respondent refused to sign a waiver card, that was but one fact among many to be considered by the judge.[17] A person who has just been arrested may decide not to sign anything for a variety of reasons other than a desire to remain silent,[18] and the courts of appeals

[16] With regard to the admissibility of confessions in federal prosecutions, the "totality of the circumstances" approach has been codified at 18 U.S.C. 3501(b).

[17] Conversely, the fact that a defendant signs a waiver form does not necessarily discharge the government's burden of proving a waiver. See *United States* v. *Cooper*, 499 F.2d 1060, 1062-1063 (D.C. Cir. 1974); *United States* v. *Hayes*, 385 F.2d 375, 377 (4th Cir. 1967), cert. denied, 390 U.S. 1006 (1968). In the absence of proof that the police obtained the signature by coercion or deception, the signed waiver form will establish a presumption that the accused waived his right to remain silent. See *United States* v. *Springer*, 460 F.2d 1344, 1349 (7th Cir.), cert. denied, 409 U.S. 873 (1972).

[18] The refusal to sign "may indicate nothing more than a reluctance to put pen to paper under the circumstance of custody. A detainee may still wish to discuss the matter with his detainers for any number of reasons, including a desire to exculpate or explain himself." *United States* v. *McDaniel*, 463 F.2d 129, 135 (5th Cir. 1972), cert. denied, 413 U.S. 919 (1973). See Comment, *The Refusal of an Accused to Sign a Written Miranda Rights Waiver Form After His Oral Affirmation of His Understanding of Those Rights Will Not Defeat a Showing of a Valid Waiver*, 43 Geo. Wash. L. Rev. 985 (1975).

therefore have unanimously held that the failure to execute a written waiver does not preclude a finding of waiver. See note 10, *supra*. Here, respondent was not coerced or tricked by the FBI agents, he acknowledged that he understood his rights (which had been explained to him twice and which he had read for himself), he explicitly remarked that he would be willing to talk to the agents, and he then freely answered the agents' questions without hesitation.[19] In short, respondent's statements were made "voluntarily, knowingly and intelligently" (*Miranda* v. *Arizona*, *supra*, 384 U.S. at 444), and the Supreme Court of North Carolina erred in holding that they were inadmissible at trial.

[19] The Court recognized in *Miranda* that the closeness in time between the warnings and the statements was a factor to be considered. 384 U.S. at 475. Respondent's admissions immediately followed his waiver.

CONCLUSION

The judgment of the Supreme Court of North Carolina should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW J. LEVANDER
Assistant to the Solicitor General

JOHN VOORHEES
Attorney

FEBRUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 286248 307